Osgoode Hall Law Journal

Volume 25, Number 3 (Fall 1987)

Article 3

The Political Economy of Administrative Fairness: A Preliminary Enquiry

Eric Tucker

Osgoode Hall Law School of York University, etucker@yorku.ca

THE POLITICAL ECONOMY OF ADMINISTRATIVE FAIRNESS: A PRELIMINARY ENQUIRY*

BY ERIC TUCKER**

**Associate Professor of Law, Osgoode Hall Law School, York University. I would like to thank the following people for their helpful comments on earlier versions of this paper: Harry Glasbeek, Allan Hutchinson, Martin Loughlin and Michael Mandel.

I. INTRODUCTION

In the last twenty years, there have been major changes in the procedures followed by government departments and administrative agencies in exercising their delegated powers. This is true with regard to a wide range of functions, including those that, according to the traditional classification of functions, have been labelled adjudicative, administrative, and, even in some cases, legislative. Institutionally, these changes have been brought about by courts imposing procedural requirements as a matter of natural justice or fairness, by legislatures enacting statutory rights to be heard, and by bureaucracies opening up their proceedings on their own initiative to allow greater public input. The implications of these developments are still being debated, but are potentially far-reaching, not just in terms of how the state is perceived, but also in terms of how it will affect the ability of groups and individuals to influence the exercise of state power when it affects their interests.

This paper will examine two issues that have arisen as a result of the administrative fairness *revolution*. The first issue arises in response to the activist stance that the courts adopted in the late 1960s and 1970s in the exercise of their supervisory powers to review the procedures followed by administrative bodies exercising delegated powers. In this period, the courts expanded the scope of their supervisory powers to include bodies that were not exercising functions that were narrowly adjudicative and they took a more activist approach in defining the content of the right to be heard. This development sparked a revival of academic interest in administrative law's theoretical underpinnings.[1] One aspect of that

---

[1] In the United States the volume of writing on due process suggests that the revival of interest was more than minor. The following represents a small sample. H.J. Friendly, "'Some Kind of Hearing'" (1975) 123 U. Pa. L. Rev. 1267; W. Van Alstyne, "Cracks in 'The New Property:' Adjudicative Due Process in the Administrative State" (1977) 62 Cornell L. Rev. 445; Michelman, "Formal and Associational Aims in Procedural Due Process" in Pennock & Chapman, eds *Due Process*, Nomos XVIII (New York: NYU Press, 1977); J.L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews* v. *Eldridge*: Three Factors in Search of a Theory of Value" (1976) 44 U. Chi. L. Rev. 28; J.L. Mashaw, "Administrative Due Process: The Quest for a Dignitary Theory" (1981) 61 Bos. U. L. Rev. 885; and J.L. Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985).

In England the revival of natural justice or fairness provoked little in the way of a theoretical re-examination of administrative law. Perhaps this is because leading English

re-examination has focused on the change in the legal form of procedural fairness review conducted by the courts. The present approach of the courts has been accurately described as one of informal activism.[2] Under this legal form the courts are vested with a broad supervisory jurisdiction and exercise great discretionary authority in determining what procedures must be adhered to by state power-holders performing a wide range of functions. This legal form is significantly different from its immediate predecessor, appropriately characterized as formal inactivism. The courts, under that form, saw themselves as being vested with a narrow supervisory jurisdiction, and with relatively little discretion to design the procedures to be followed by state power-holders exercising judicial functions.[3]

This shift in the legal form is seen by some, particularly by those influenced by critical legal studies (hereafter CLS), to pose a crisis not just for administrative law theory, but for legal liberalism generally. Once the courts abandon logically formal rationality, they lose the appearance of neutrality and their decisions can be seen as political choices. By demonstrating that the distinction between law and politics cannot be sustained, CLS theorists believe that they can demonstrate the bankruptcy of legal liberalism which, in their view,

---

commentators characterized the period of inactivism that preceded cases such as *Ridge* v. *Baldwin*, [1964] A.C. 40 as one of "deviation" (J.M. Evans, ed., *De Smith's Judicial Review of Administrative Action*, 4th ed. (London: Stevens, 1980) at 164) or as a "break with tradition" (H.W.R. Wade, *Administrative Law*, 5th ed. (Oxford: Clarendon Press, 1982) at 458). I am not suggesting that there have not been serious examinations of administrative law theory, only that they have not arisen out of, or focused on, procedural fairness issues. For example, see T. Prosser, "Towards a Critical Public Law" (1982) 9 J. of Law & Soc. 1.

There was somewhat greater interest in the theoretical implications of these developments in the Commonwealth. For example, see D.L. Mathieson, "Executive Decisions and *Audi Alteram Partem*" [1974] N.Z.L.J. 277, and G.D.S. Taylor, "Natural Justice-The Modern Synthesis" (1975) 1 Mon. U. L. Rev. 258. It seems, however, that Canadians, or academics working in Canada, have been the most active in examining the theoretical ramifications of the revival of an activist procedural fairness jurisprudence. For example, see D.H. Clark, "Natural Justice: Substance and Shadow" [1975] Public Law 27; D.J. Mullan, "Fairness: The New Natural Justice?" (1975) 25 U.T.L.J. 281; M. Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 U.T.L.J. 215; R. Macdonald, "A Theory of Procedural Fairness" (1981) 1 Windsor Y.B. Access Just. 3; J. Grey, "The Ideology of Administrative Law" (1983) 13 Man. L.J. 35; and A.C. Hutchinson, "The Rise and Ruse of Administrative Law" (1985) 48 Mod. L.R. 293.

[2]See Loughlin, *supra*, note 1.

[3]See *infra*, at text accompanying notes 15-24.

is premised on the viability of this distinction. Furthermore, they believe that this demonstration will contribute to the popular delegitimation of existing social and institutional arrangements by showing that the hierarchies and inequalities they embrace and support are not necessary or natural, but rather are political and, therefore, contingent constructions, lacking adequate justification.

Ironically, legal liberals welcomed the very shift that critics identified as crisis-producing. A fairly typical example of the mainstream response in Canada is that of David Mullan who advocated the adoption of the "New Natural Justice" on the basis that it would finally allow the courts to ask the right question: "what procedural protections, if any, are necessary for this particular decision-making process?"[4] Although Mullan was cognizant of the potential for a more informal, functionalist jurisprudence to lead to internal incoherence, lack of predictability, and excessive interference with the efficient operation of administration, he expressed confidence in the ability of the courts to develop procedural fairness review in ways that would avoid these dangers.[5]

The fact that for liberal administrative law theorists there has been no crisis created by the shift to an informal, functionalist jurisprudence may suggest an unusual capacity on their part to deny the impoverishment of their own theory. However, it may also suggest that the CLS critique of legal liberalism in general, and of procedural fairness review in particular, is less effective than it might be. In particular, by demonstrating the internal incoherence of legal doctrine, critics, in my view, mistakenly believe that they have struck a telling and, indeed, a fatal blow against legal liberalism. They fail to consider that the internal coherence of the law may not be as important to the survival of legal liberalism as is its ability to adapt in ways that maintain a high level of functional compatibility between the legal system and the social formation as a whole. The ability of the courts to shift between formal and informal modes of justification for their decisions, knowing that both

---

[4]Mullan, *supra*, note 1 at 315.

[5]Other commentators have been even more enthusiastic about this revival of informal activism. For example, see J. Grey, "The Duty to Act Fairly after *Nicholson*" (1980) 25 McGill L.J. 598.

can be defended as legitimate techniques in the common law method, may count as a strength of judicial reasoning rather than a weakness. Demonstrations of the incoherence of legal reasoning may cause mild embarrassment to members of the legal profession and legal academe, but not deep shame. Furthermore, to the extent that this critique is heard and understood outside the profession and the academe, it is not clear that the public is astonished or appalled by the revelation that judges do not act according to the dictates of formal rationality. To the contrary. People are just as likely to take comfort from the fact that the courts are prepared to find "just" solutions to the claims that are brought before them, even if that is achieved at the expense of coherence and consistency.

The elaborate deconstruction of legal doctrine by CLSer's stands in stark contrast to their failure to develop a social theory of law and legal change. To the extent that they have a theory at all, it derives from a simplified Weberian sociology of law. For some, this lack of interest in social theory stems from their treatment of law as autonomous from social structure.[6] However, even those

---

[6]Thus, for example, Duncan Kennedy, at least at one time, claimed to have identified a fundamental contradiction between individualism and altruism in modern legal consciousness and, perhaps, a fundamental or ontological contradiction between self and society. He described liberal thought generally, and legal liberalism in particular, as an unsuccessful attempt to deny or mediate this contradiction. For example, Kennedy traced the persistent tension between formally rational and substantively rational modes of justification in legal liberalism to this contradiction. Formally rational law emanated from individualistic impulses while substantively rational law emanated from communitarian ones. The unresolved tension between individualism and communitarianism in liberalism expresses itself as an unresolved tension between formal and substantive rationality in liberal legal thought and practice. Because Kennedy derived the source of conflict and contradiction in law from the human condition, or, perhaps, from liberal consciousness, he saw no need to examine the political, economic, and social historical context in which legal developments took place. He made no effort to link the dominance of a particular mode of legal thought or structure of legal categories at a particular time with any other developments in the social formation. Presumably, any shifts that might have taken place were contingent, variations on a theme bounded by the possibilities of the basic contradiction, but whose specific determinants are random and, perhaps, ultimately inexplicable. (These themes are most strongly developed in Kennedy's early work. See "Legal Formality" (1973) 2 J. Leg. Stud. 351; "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685; and "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev. 205 [hereinafter "Blackstone's Commentaries"]. He has since renounced the "fundamental contradiction." See P. Gabel & D. Kennedy, "Roll Over Beethoven" (1984) 36 Stan. L. Rev. 1 at 14-26.)

Relying on the Kennedy framework, Hutchinson, *supra*, note 1 at 299-300 makes the broad, unsubstantiated claim that a "no hearing" rule in procedural fairness cases is linked with communitarian values while a "full hearing" rule is linked with individualism, and as these contradictory visions or values compete endlessly, doctrinal determinacy is "contrived, superficial and ephemeral" and "must give way to deep indeterminacy."

who treat the law as if it were autonomous from social structure do not necessarily believe it. Indeed, in Kennedy's case, he recognizes the failure to develop a social theory of law to be an omission which he justifies on the basis that "we need to understand far more than we now do about the content and the internal structure of legal thought before we can hope to link it in any convincing way to other aspects of social, political or economic life."[7] Thus, even for those who view the law and society relationship as both important and problematic, there is a tendency to avoid serious engagement with that relationship either by deferring consideration of it, or by making a nodding reference toward an undefined theory of relative autonomy.[8]

Closer attention to these questions is possible and would enhance the salience and perspicacity of a critical analysis of

---

Similarly, Frug, in an article that directly addressed the development of administrative law, argued that we can view legal doctrine as an unsuccessful series of stories designed to legitimate bureaucracy by "define[ing], distinguish[ing], and render[ing] mutually compatible the subjective and objective aspects of life." See G.E. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv. L. Rev. 1276 at 1287. Frug described a succession of four such stories and convincingly showed their fit with bodies of legal doctrine. He too, however, never suggested any linkage between the movement through these legal stories and changes in the role of the state in the capitalist social formation and corresponding changes in the institutional structures of the state. Rather, according to Frug, the story was driven by a "dialectic of critique and response" carried on as much in our own divided consciousness, as it is between defenders and critics of large-scale bureaucracy. *Ibid.* at 1281. As a result, Frug does not develop a social theory of law because he does not see the relationship between law and concrete social developments as problematic or interesting.

[7]"Blackstone's Commentaries," *ibid.* at 221.

[8]Allan Hutchinson's critical analysis of administrative law and scholarship is a particularly clear example of this later strategy. See Hutchinson, *supra*, note 1. At times, Hutchinson suggests there are some dominant political and social forces which place definite, but not necessarily narrow, limits on law. "The law is like a dog on a long leash. Although it will ultimately follow the lead of its political master, it has considerable range of movement." *Ibid.* at 297. However, at other times, he seems to suggest a more pluralist and idealist world in which competing, disembodied social visions of apparently equal power battle endlessly for the hearts and minds of common law judges and academic commentators. "The only perceivable 'pattern' is the constant oscillation between competing social visions, albeit fragmentedly portrayed and partially grasped." *Ibid.* at 314. Indeed, Hutchinson goes on to attack John Griffith (*The Politics of the Judiciary*, 3rd ed. (London: Fontana Press, 1985)) and Patrick McAuslan ("Administrative Law, Collective Consumption and Judicial Policy" (1983) 46 Mod. L. Rev. 1) because of their support for the view that there is an ideological coherence to administrative law which reflects the judiciary's commitment to the protection of basic values and institutions of the existing capitalist social formation. These formulations by Hutchinson suggest unresolved and unexplored ambiguities over important issues such as the degree of relative autonomy that the law enjoys and the characteristics of the social formation in which the law is located.

predominant legal theory and practice.[9] In particular, an examination of developments in the form and practice of judicial review of administrative fairness in the context of the changing role of the state in a capitalist social formation and the particular institutional structures developed to facilitate state action will disclose that in general a high level of functional compatibility has been maintained between them. Although this paper does not explore the means by which the articulation of the law with other practices in the social formation takes place, it will have discharged one of its burdens if it succeeds in convincing its readers there is such an articulation worth exploring in more detail.

The second debate addressed by this paper is about prospects for, and consequences of, the development of administrative fairness, including, but not limited to, the current forms and practices of judicial review. To a significant extent, academic discussion of this issue has focussed on (i) the institutional capacities of courts to design appropriate procedures for a wide range of government functions and (ii) the political judgments that judges bring to bear when balancing competing interests. While these debates do provide some insight into judicial review, they are, in my view, too narrowly focussed. First, the debate implicitly assumes that courts were and are the principal institutional force behind the development of administrative fairness. Such an assumption ignores the substantial role of the legislature and the bureaucracy itself in opening up the administrative process. Second, much of the criticism of the courts and the adjudicative paradigm assumes there is another institution or ordering process that will fashion more effectively, efficiently, and fairly appropriate procedures. While that may be true, the focus on the relative competencies of various institutions often overlooks some more fundamental constraints on the ability of procedural solutions to address widespread discontent with the welfare state.

---

[9] This weakness in the CLS approach has been noted by a number of left critics of CLS who are generally sympathetic to the progressive aspirations of that movement. This essay builds on that approach. See F. Munger & C. Seron, "Critical Legal Studies versus Critical Legal Theory: A Comment on Method" (1984) 6 Law and Policy 257; A. Hunt, "The Theory of Critical Legal Studies" (1986) 6 Ox. J. of Leg. Studies 1; and W. Holt, "Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law" [1986] Wisc. L. Rev. 677. Also see D.F. Brosnan, "Serious But Not Critical" (1987) 60 So. Cal. L. Rev. 259.

By viewing the development of administrative fairness as a response to crisis tendencies in capitalist social formation and the changing role of the state in that formation, it will be possible to explore its implications more fully. From a functionalist perspective, we want to ask whether administrative fairness, including the practice of judicial review, can serve as a source of legitimation and stabilization for a state which is, at times, beleaguered by contradictory demands that it simultaneously facilitate capitalist economic development and maintain minimally acceptable levels of economic, social, and cultural well-being. Will a procedurally fair hearing make the parties to a dispute more willing to accept the legitimacy of the state's decision, or is it the substantive outcome which chiefly determines this? As well, from a more radical perspective we want to consider the transformative potential of achieving greater legal rights and opportunities to participate in administrative decision making. In this regard, we consider the limited conception of participation embodied in the present paradigm of administrative fairness and its application to liberal regulatory programs. In particular, the participatory mechanisms which are provided typically do not empower directly the purported beneficiaries of government programmes so that they are able to protect themselves. Rather, they must turn to some administrative body which will hear them and decide what, if anything, is to be done.[10] What are the prospects of transforming the concept of administrative fairness so that it includes a right of co-determination and what are the consequences of participating in administrative proceedings without such rights? Further, there are serious questions about the extent to which groups which lack independent power resources can utilize the procedural rights and opportunities already recognized or provided. In other words, how does administrative fairness operate in practice in a social formation characterized by enormous structural inequalities in the distribution

[10]This thesis is developed at length by Charles Noble, *Liberalism at Work* (Philadelphia: Temple U. Press, 1986). Ironically, the state has perhaps gone furthest in this direction in the area of occupational health and safety regulation, the topic of Noble's book. For example, the right to refuse unsafe work, which exists both in Canada and the United States, empowers workers to protect themselves directly. The ability of workers to exercise this legal right effectively, however, raises further questions about the efficacy of any right to participate which does not address the underlying unequal distribution of power in our society.

of wealth and power? Obviously, we cannot answer these questions satisfactorily in a paper such as this. Again, it is the burden of this paper to demonstrate the value of asking these questions in their proper political-economic context and to suggest further paths of inquiry.

These themes will be developed as follows. The first part of this essay describes the major doctrinal shifts in the jurisprudence of procedural fairness review over the past one hundred years. The second part links these shifts with developments occurring in the capitalist social formation and in particular with the changing role of the state and the institutional forms of state intervention. The third part examines the potential of the current practice of procedural review by the courts and, more generally, the current practice of liberal proceduralism to resolve the crisis tendencies which undermined earlier models of fairness review and bureaucratic operations.

II. THE DEVELOPMENT OF PROCEDURAL FAIRNESS IN ADMINISTRATIVE LAW

The story of the doctrinal development of procedural fairness in England during the nineteenth and twentieth centuries has been told in numerous books and articles.[11] The situation in Canada, especially in the nineteenth century, remains largely unexamined.[12] This paper does not fill that gap in the literature. For the purpose of this section, the English pattern is treated as paradigmatic, although developments in contemporary Canadian law are incorporated into the story. A subsequent section considers some possible historical differences between Canadian and English

---

[11]See Evans, ed., *supra*, note 1 at 158-75; Wade, *supra*, note 1 at 447-71; and P.P. Craig, *Administrative Law* (London: Sweet & Maxwell Limited, 1983) at 253-65.

[12]Of course, it is not clear that Canada had a history distinct from England's in this particular area of the law, but this cannot be presumed. Indeed, for reasons to be discussed *infra*, there are reasons to believe that Canada's early development may have been different from that of England. For a preliminary discussion of issues in the Canadian history of administrative law, see R.C.B. Risk, "Lawyers, Courts and the Rise of the Regulatory State" (1984) 9 Dal. L.J. 31. Of course, recent developments have been documented much more fully. See *infra*.

developments, but does not reach firm conclusions. Here, we will only briefly recapitulate the major doctrinal shifts that have occurred in the judicial regulation of procedural fairness to introduce the outlines of the legal story that will be examined and to familiarize the non-specialist with the legal terminology in which the doctrine is couched. In the subsequent section the adequacy of theories in respect of the dynamics of legal change in this area will be evaluated.

Judicial review of procedural fairness is primarily concerned with the question of when and how individuals and corporations are entitled to participate in administrative processes that may affect their interests. While the form of that participation may vary, typically we are concerned with those situations in which the court finds that the public authority was under a duty to give notice to affected parties and to provide them with "some kind of hearing"[13] as a condition of the legal exercise of their authority. The precise content of this duty will not concern us here, although we will examine the extent of its flexibility.

Traditionally, the telling of the story of the development of judicial review for procedural fairness in Anglo-Canadian administrative law begins with brief references to some seventeenth and eighteenth century cases in which the courts imposed a duty to act fairly. It then quickly turns to the nineteenth century and focuses on *Cooper* v. *Board of Works for the Wandsworth District.*[14] There the court held that the board in question was under a duty to hear a property owner before exercising the powers of demolitions that were conferred upon it by statute. The judges, however, offered different theories to justify the result. This illustrates that the law was in a formative period and that no formal criteria existed which could be used to determine whether or not a duty to hear was owed. Further, the case suggests that the judges were in an activist phase in that they were quite prepared to impose procedural

---

[13]The phrase comes from *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) at 557-58, White J., and was subsequently used as the title of an influential article on the subject by H.J. Friendly, "'Some Kind of Hearing'," *supra*, note 1.

[14]*Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (hereinafter *Cooper* cited to E.R.). For the early history of procedural review see Evans, ed., *supra*, note 1 at 158-62.

requirements when individual interests were adversely affected by state action, even though no such requirements were provided for in the enabling legislation.[15]

The next chapter of the story opens in the early twentieth century with the courts beginning to reconsider and then restrict the scope of the duty to act in a procedurally fair manner, or, to use the preferred term of the time, the duty to provide natural justice. The courts began to hold that the requirements of natural justice only applied to those bodies "having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially." This was interpreted to deny natural justice to those who could only point to a privilege that was being withdrawn and to those whose rights were being affected by an investigatory or advisory body. As well, the courts held that the duty to act judicially had to be "super-added," in the sense that it could not be derived simply from the fact that the body had the duty to determine the rights of the subject. Rather, the courts frequently looked to see whether the enabling statute contemplated an adversarial process.[16] This trend continued until mid-century, reaching its high point in *Nakkuda Ali* in England and *Copithorne* in Canada.[17] The treatise writers dislike this period, introducing it by sub-headings such as "The Path of Deviation"[18] or "The Break With Tradition."[19]

The decision in *Ridge* v. *Baldwin* initiated a revival of a more expansive role for the judiciary in supervising procedures of administrative bodies.[20] In that case, the court disapproved the

---

[15]"...although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." *Cooper, ibid.* at 420, Byles J.

[16]See *R.* v. *Electricity Commissioners* (1923), [1924] 1 K.B. 171 at 204-05, Atkin L. See in particular *R.* v. *Legislative Committee of the Church Assembly* (1927), [1928] 1 K.B. 411.

[17]*Nakkuda Ali* v. *Jayarante* (1950), [1951] A.C. 66; *Calgary Power Ltd* v. *Copithorne*, [1959] S.C.R. 24.

[18]Evans, ed., *supra*, note 1 at 164.

[19]Wade, *supra*, note 1 at 458.

[20](1962), [1964] A.C. 40.

doctrinal impediments to judicial review erected over the previous forty years, and adopted an expansive and open-ended view of the circumstances which required natural justice. However, the significance of the threshold categorization of a function as a judicial one to qualify for judicial review of procedures remained somewhat clouded until Parker, C.J.'s judgment in *Re H.K., (an infant)*, which revived the expansive language of fairness and expressly attached a duty to act in a procedurally fair manner to functions not categorized as judicial.[21] This expansive fairness doctrine was adopted by the Supreme Court of Canada in its judgment in *Nicholson*.[22]

These decisions substantially lowered the threshold one has to meet to claim entitlement to fair procedures. Recently, the Supreme Court articulated the threshold test as follows: "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[23] Although there is still some uncertainty about the significance of characterizing a function as judicial or quasi-judicial as opposed to administrative or legislative,[24] the overall result of the post-*Nicholson* case law has been to extend the boundaries of judicial review of procedural fairness and to shift the focus of the judicial

---

[21] *Re H.K., (an infant)* (1966), [1967] 2 Q.B. 617.

[22] *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1978), 88 D.L.R. (3d) 671 (S.C.C.) [hereinafter *Nicholson*].

[23] *Cardinal and Oswald* v. *Director of Kent Institution* (1985), 24 D.L.R. (4th) 44 (S.C.C.) at 51-52, LeDain J. [hereinafter *Oswald*].

[24] Dickson C.J.C., has clearly rejected these distinctions except where they are drawn by statute. For example, see his judgments in *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)* (1979), 106 D.L.R. (3d) 385 at 410-11 (S.C.C.) (rejecting a categorical distinction between judicial functions affected by natural justice and administrative functions affected by fairness) and in *Homex Realty & Development Co. Ltd* v. *Village of Wyoming* (1981), 116 D.L.R. (3d) 1 at 10-11 (S.C.C.) (rejecting a categorical distinction between legislative and quasi-judicial functions). On the other hand, in *Oswald, ibid.*, the court explicitly excluded legislative functions from the requirements of fairness. Further, some judges have continued to categorize functions as judicial as opposed to administrative even when there was no statutory requirement to do so. For example, see *Re Taylor and Law Society of British Columbia* (1981), 116 D.L.R. (3d) 41 (B.C.S.C.).

inquiry to the question of what fairness requires in the circumstances. In answering that question, the courts have generally adopted a balancing approach which considers a number of factors, including the interest of the individual at stake, the circumstances in which the power is being exercised, the impact of the decision, and the legitimate interests of the state in not being burdened with additional procedures.[25]

III. A SOCIO-HISTORICAL ANALYSIS OF DOCTRINAL DEVELOPMENTS

Having described the doctrinal shifts that occurred in the law of procedural fairness review over the last one hundred years, we next examine the underlying modes of rationality of the law and the dynamics of the change from one predominant form to another. This will be done in conjunction with an examination of the crisis tendencies in the capitalist social formation and the development of the capitalist state. As a result, the discussion that follows will, on the one hand, be rather abstract as we use Weber's ideal types as a way of characterizing different modes of legal rationality, while on the other hand, it will suggest concrete linkages between the form and content of legal doctrine and the development of the capitalist state.

A. *Informal Activism: The First Phase*

The social formation of mid to late-nineteenth century England and Canada can best be characterized as liberal-capitalist. The economic system was capitalist, by which we mean that the private owners of the means of production (capitalists) hired the immediate producers (workers) for wages and kept the fruits of the labour process for sale on the market. The market performed the function of allocating resources through the principle of "voluntary"

---

[25] These criteria were first articulated in *Lazarov* v. *Secretary of State of Canada*, [1973] F.C. 927 (F.C.A.D.), a pre-*Nicholson* case. The process and criteria resemble those used in England (*Durayappah* v. *Fernando*, [1967] 2 A.C. 337) and in the United States (*Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

exchange of equivalents between legally equal and autonomous rights-bearing subjects who, according to liberal ontology, are more fundamental than, and come prior to, human society and its institutions and structures.[26] The idealized role of the state in this social order was neither to steer the economy nor to legitimate the social order, but rather to constitute and secure the institutions of private property and freedom of exchange, and generally to complement the market which was both self-steering and self-legitimating. This is consistent with the commitment of classical liberal theorists to limited government and the preservation of a "private sphere" as the foundation of individual freedom.[27]

Obviously, neither Canadian nor English society ever fitted this paradigm perfectly, and it is precisely the contradictions that bedevilled predominantly liberal-capitalist social formations that are of most interest in that they provided the occasion for the emergence of modern administrative law, and the modern law of procedural fairness review in particular.[28] Even at a very early stage in its development, the market was unable to allocate resources efficiently and to consistently generate conditions favourable to accumulation, and the state began to assist in the performance of these functions. Indeed, in Canada in particular, the state played an unusually active role in facilitating accumulation.[29] Reg Whitaker, following Gad Horwitz, emphasized the impact of the Tory tradition

---

[26]For a recent account of liberal ontology, see A. Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984) at 15-37.

[27]M. Friedman, *Capitalism and Freedom* (Chicago: U. of Chi. Press, 1962) c. 1.

[28]This contradiction in the historical development of capitalism is neatly captured by Polyani's formulation of the "double movement," consisting of the continuous expansion of the market met by a countermovement aimed at checking its expansion. See K. Polyani, *The Great Transformation* (Boston: Beacon Press, 1957) at 1130-34. The characterization of the early nineteenth century as a period of *laissez-faire* does not, therefore, overlook the fact that the state was simultaneously expanding. Rather, it is based on the predominance of the market economy and the classes that supported it. In the words of Derek Fraser, "[t]he onus of proof, so to speak, was on those who challenged the ideal [of *laissez-faire*] and claimed it to be inappropriate." D. Fraser, *The Evolution of the British Welfare State* (London: Macmillan, 1973) at 114.

[29]See L. Panitch, "The Role and Nature of the Canadian State" in L. Panitch, ed., *The Canadian State: Political Economy and Political Power* (Toronto: U. of T. Press, 1977) 3 at 14-18.

on the structure, function, and image of the early Canadian state. However, he also linked the dominance of that tradition to the imperialist-mercantilist objectives of the British architects of colonialism. Britain was instrumental in creating a local bourgeoisie and a local state structure which could guarantee its colonial interests. As a result, an unusually close and symbiotic relationship developed between the bourgeoisie and the state. Consequently, the *laissez-faire* liberal vision of the limited state failed to attract the support of the local bourgeoisie. Whitaker summarized the role of the Canadian state as follows:

> [T]he state offered an instrumentality for facilitating capital accumulation in private hands, and for carrying out the construction of a vitally necessary infrastructure; for providing the Hobbesian coercive framework of public order and enforcement of contract within which capitalist development could alone flourish; and, finally, for communicating the symbols of imperial legitimacy which reinforced the legitimacy of unlimited appropriation in a small number of private hands. The basic engine of development in Canada was to be private enterprise, but it was to be *private enterprise at public expense.* That is the unique national feature of our Tory tradition.[30]

As well, the market proved not to be entirely self-legitimating and, at times, the dysfunctional consequences of the accumulation process generated sufficient dissatisfaction and organized discontent to force the state to empower itself to respond. During the early part of the nineteenth century, the primary class conflicts were between independent commodity producers and the financial and mercantile bourgeoisie. That struggle, however, centered around the question of responsible government which was achieved in the 1840s despite the defeat of the rebellion of 1837. Although there was a substantial increase in the size of the state bureaucracy in the pre-confederation period, and a rationalization of its operations, the state was largely concerned with revenue and resource development, areas more related to accumulation than legitimation.[31] The Canadian state only began to assume greater direct responsibility for legitimation later in the nineteenth century as a result of conflicts arising out of the industrial revolution.

---

[30]R. Whitaker, "Images of the State in Canada" in L. Panitch, ed., *ibid.* at 43. For a more detailed study of the role of the state in the private development of the economy, see H.V. Nelles, *The Politics of Development* (Toronto: Macmillan, 1974).

[31]See J.E. Hodgetts, *Pioneer Public Service* (Toronto: U. of T. Press, 1955).

However, its activity in this field was (and remains) relatively underdeveloped in comparison with other industrializing countries.[32]

Demands for increased involvement by the state in steering the market and legitimating the social order may generate tensions because the demands that the state is being called upon to respond to may be contradictory. First, there may be intra-class conflict over the direction of state intervention in aid of accumulation. Second, inter-class conflict sets up potential contradictions between reform in the name of legitimation that may impair accumulation, and state action in the name of accumulation that may intensify popular dissatisfaction. The question of how the state resolves those contradictory pressures requires separate analysis.[33] Regardless of the particular outcome, however, state intervention, in the name of either accumulation or legitimation, which interferes with the ontologically posited rights and freedoms of the individual may be difficult to legitimate from within classic liberal ideology. Furthermore, to the extent that ideology is embedded in constitutional or legal doctrines which can be invoked to control or limit state intervention, the legality of such actions may become problematic. Judicial review of procedural fairness provided an avenue for challenging the legality of state action, and for mediating the tensions arising between the ideology and practice of historically evolving liberal capitalist social formations.

Assuming that *Cooper's* case is paradigmatic of the Anglo-Canadian judicial approach to procedural fairness review in the mid-nineteenth century,[34] we can conclude that the law in this area exhibited a relatively low level of norm generality and

---

[32]See Panitch, *supra*, note 29 at 18-23.

[33]For example, the state may empower itself but then not exercise its power, or it may exercise its power selectively so as to minimize its impact on the accumulation process. Symbolic legislation is a widely noted phenomenon. See generally, M.J. Edelman, *The Symbolic Uses of Politics* (Urbana: U. of Ill. Press, 1985). For analyses of the exercise of state power in the area of occupational health and safety that explore this theme see Curran, "Symbolic Solutions For Deadly Dilemmas: An Analysis of Federal Coal Mine Health and Safety Legislation" (1984) 14 Int'l. J. of Health Services 5; and E. Tucker, "Making the Workplace Safe in Capitalism: The Enactment and Enforcement of Factory Legislation in Ontario" [forthcoming, (1988) 21 Labour/Le Travail].

[34]For reasons to be discussed *infra*, it is not at all clear that *Cooper* can be considered paradigmatic of mid- to late-nineteenth century Canadian jurisprudence.

differentiation, or to put it in Weberian terminology, it tended towards substantive irrationality.[35] On the dimension of norm generality, the relative lack of legal rationality springs from the fact that in order for courts to determine whether there was a duty to act fairly and, therefore, whether they had jurisdiction to supervise the procedures of the body, they could not mechanically apply pre-existing, unambiguous rules. Instead, judges appealed to principles whose application required individualized assessments of a number of circumstances. Indeed, as noted earlier, it appears that the ambit of the applicable rules or the relevant circumstances were not settled at the time the case arose. For example, the judges in *Cooper* could not agree amongst themselves whether the procedural requirements of natural justice only attached to judicial or quasi-judicial functions, or whether the role of the court was to give effect to the express intention of the legislature.[36]

In terms of norm differentiation, the justification offered for the judicial imposition of common law procedural standards was, in part, formal, but the difficulties inherent in that project brought substantive arguments to the surface, or at least very close to the surface. For example, Willes, J. formally justified the finding of a duty to hear on the ground that the court was merely giving effect to the intent of the legislature as manifested in the words of the statute.[37] Yet he began his judgment with an appeal to broad principle: "I apprehend that a tribunal which is by law invested with power to affect the property of one of her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded

---

[35]M. Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard U. Press, 1966). Also see R. Bendix, *Max Weber* (New York: Doubleday, 1962) c. 12 and D.M. Trubek, "Max Weber on Law and the Rise of Capitalism" [1972] Wisc. L. Rev. 720 at 727-31.

[36]Erle, C.J., expressly rejected the proposition that the duty to hear only applied to judicial functions, *supra*, note 14 at 418, and justified the imposition of the duty to hear both on the basis of "the decided cases and by a due consideration for the public interest" (at 417). Willes, J., on the other hand emphasized that the powers exercised by the board were judicial (at 418) and that the legislature had intended that a hearing was to be held prior to the exercise of those powers (at 419).

[37]*Ibid.* at 419, Willes J.

upon the plainest principles of justice."[38] Similarly, Byles, J. justified the imposition of a duty to hear on the basis that "the justice of the common law will supply the omission of the legislature,"[39] while Erle, C.J. justified the court's action on the basis of "the decided cases" and "by a due consideration for the public interest."[40] Clearly, Byles and Erle, JJ. maintained a formal element in their judgments by appealing to the decided cases and by specifying that the justice being applied was the justice of the common law. However, their appeals to more general principles of justification suggest the difficulty they experienced in couching their judgments in a purely formal style. Substantive justifications, most strongly rooted in *laissez-faire* ideology, and partially, but not perfectly embedded in the common law, were raised to defend the result. Indeed, we can view the case as part of a project to embed the premises of *laissez-faire* capitalism into the common law.

The function served by this jurisprudence in England was quite clear. It defended and promoted the ideology and practice of *laissez-faire* capitalism against forms of state regulation. It did so by defining a sphere of private entitlements that the state could not impair without, at the very least, first giving notice to, and then hearing the private right holder. In *Cooper*, it was of the utmost importance that a private property interest was being adversely affected by state action.[41]

Implied procedural fairness review was not the only technique employed by the English courts to restrict the scope of state activity. Indeed, it probably was not even the most important one. The courts were also vested with the authority to interpret statutes, and they regularly employed restrictive interpretive premises to limit the substantive powers of administrative bodies and, in particular, local governments. For example, the courts narrowly

---

[38] *Ibid.* at 418.

[39] *Ibid.* at 420.

[40] *Ibid.*

[41] Erle and Willes, JJ., both expressly refer to the principle that "no man shall be deprived of his property without an opportunity of being heard." *Ibid.* at 418.

interpreted the grant of statutory powers to local authorities to regulate the construction of new buildings.[42]

I should emphasize that I am not asserting that the function of the law of procedural fairness review during this period was structurally determined or, for that matter, that the function performed by the law was necessarily more compatible with the social formation than a law which was less interventionist. With respect to the first point, we do not have an adequate account of the reasons why the court chose to defend the ideology and practice of *laissez-faire* capitalism against state interventions. It is not sufficient to show that during this period, not only was the market the principal steering mechanism of the economy, it was also a major source of legitimating principles for other sub-systems, including the legal system.[43] Although law, and the state generally, were supplemental and subordinate to the market, we still need to examine specifically the extent of that subordination and the mechanisms for its achievement. In this regard, we must also be sensitive to those factors which promote judicial autonomy and prevent the full subordination of the legal system to other sub-systems in the social formation. To the extent that *laissez-faire* principles were embedded in the law, was this a function of the

---

[42]For a description of the statutory powers conferred on local governments in this regard, and judicial interpretations of the scope of those powers, see W.C. Glen, *The Law Relating to Public Health and Local Government*, 6th ed. (London: Butterworths, 1872) at 218-30. In the area of housing, Ivor Jennings argued for a somewhat different periodization. According to Jennings, the courts only began restrictively interpreting local government powers with respect to housing in the 1920s. See I. Jennings, "Courts and Administrative Law – The Experience of English Housing Legislation" (1936) 49 Harv. L. Rev. 426. For a recent overview of the development of legal controls over local government, see M.F. Loughlin, "Administrative Law, Local Government and the Courts" in M.F. Loughlin *et al.*, eds *Half a Century of Municipal Decline 1935-1985* (London: George Allen and Unwin, 1985) at 121-43.

More generally, see R.B. Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Chapel Hill, U. of N.C. Press, 1978) at 161, where, after recounting a number of instances in which the House of Lords narrowly construed legislation affecting private property interests, he notes that "[I]n these years (1844-1912 ed.), there was little doubt that where the state was involved, *laissez-faire* attitudes led to a strong presumption in favour of protecting private property rights, particularly the right to property." (fn. omitted).

[43]See generally J. Habermas, *Legitimation Crisis*, trans. T. McCarthy (Boston: Beacon Press, 1975) at 18-24. For a good exposition and critique of Habermas's views on law see, C. Summer, "Law, Legitimation and the Advanced Capitalist State: The Jurisprudence and Social Theory of Jurgen Habermas" in D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic Press, 1983) at 119.

class background and education of the judges?[44] Did the legal forms of action and theories that were initially invoked to support informal activism shape its practice in any way?[45] As to the question of functional compatibility, can we unproblematically specify the functionally optimal legal response given the contradictions that generated pressure for the expansion of state power, including the power of local government authorities?[46] However, even if we cannot present a full explanation of the court's behaviour, or demonstrate that it was the optimal response for the preservation of a capitalist social order, it was nevertheless the case that the courts provided a legal framework highly compatible with, and supportive of, the institutional arrangements and social relations in a predominantly *laissez-faire* capitalist social formation.

Having argued that the form and content of the law of procedural review in the late nineteenth century was functionally compatible with the classic liberal-capitalist social formation and that it could be and was sufficiently justified by appeals to substantive notions of justice rooted in *laissez-faire* ideology, it becomes necessary to explain why the law changed in the early decades of the twentieth century.

Loughlin argued that the shift to inactive formalism took place as a result of the court's effort to preserve the integrity of the

---

[44]For example, one way that Max Weber explained the compatibility of English common law with capitalist development was on the basis that "[l]egal training has primarily been in the hands of the lawyers from among whom the judges are recruited, i.e., in the hands of a group which is active in the service of propertied, and particularly capitalistic, private interests and which has to gain its livelihood from them." Rheinstein, *supra*, note 35 at 318. Also see M. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard U. Press, 1977) for a similar explanation for the development of American common law.

[45]In this sense the evolution of the law might be thought of as analogous to the evolution of the panda's thumb. Selection processes and pressures operate on existing characteristics and therefore do not necessarily produce optimal adaptations, but merely workable ones. See S.J. Gould, *The Panda's Thumb* (New York: Norton, 1980) c. 1. The same point was also made by E. Blankenburg, "The Poverty of Evolutionism: A Critique of Teubner's Case For 'Reflexive Law'" (1984) 18 Law & Soc. Rev. 273 at 284 ("[T]he selection of satisfactory (not necessarily 'optimal') regulatory modes appear to be the pattern.").

[46]For an earlier discussion of this problem in the context of employers' liability law, see E. Tucker, "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22 Osgoode Hall L.J. 213 at 271-75. For discussion of the development of English local government, see K.B. Smellie, *A History of Local Government* (London: George Allen & Unwin, 1968).

judicial process.[47] This was necessary because continued activism would have implicated the courts in the selection of policy, and this would have been inconsistent with the limited role envisaged for the courts under the traditional tripartite division of powers between the legislature, the executive, and the courts. Underlying this analysis is an implicit assumption that the substantively (ir)rational model of law represented by *Cooper* is inconsistent with the foundations of legal legitimacy in liberal-democratic states, and that its appearance generates crisis tendencies in the law.

This account of the crisis tendencies inherent in the legal form typified by *Cooper*, and its resolution by the courts, seems inadequate on at least two grounds. First, it embraces an excessively narrow and *a priori* view of the bases of legal legitimacy in a modern legal order which underestimates the significance of outcomes.[48] Second, it locates the crisis *and its causes* inside the legal system with little regard to developments in the social formation, broadly conceived. What is missing is a recognition of the complexity and contradiction in the legal order,[49] and its relation to the other components of the social formation.

The claim that the legitimacy of the modern legal order, and its ability to legitimate domination, is overwhelmingly determined by the extent to which it operates according to the dictates of logically formal rationality, seems greatly exaggerated.[50] Although this view is firmly grounded in Weberian sociology of law, in my view, it reflects one of its weaknesses. As Cotterrell has noted, formal legal rationality tends to take on a life of its own in Weber's sociology of law. As a result, this approach obscures the normative dimensions inherent in any system of rules and the importance of those for the

---

[47] *Supra*, note 1 at 220.

[48] For a similar critique directed at CLS, see generally Hunt, *supra*, note 9 at 36.

[49] D. Trubek, "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law" (1977) 11 Law & Soc. Rev. 529.

[50] The claim that law in any form legitimates domination has been subject to serious criticism. See A. Hyde, "The Concept of Legitimation in the Sociology of Law" [1983] Wisc. L. Rev. 379. My argument is that in some circumstances, but not all, legality plays an important, but not necessarily successful legitimating function, and that no single form of legality is uniquely suited to perform that function.

law.[51] The same pattern was also present in the area of employer liability and occupational health and safety law. The courts applied the English common law rigidly, but did not strongly resist legislative change. As well, the legislature left the application of the law in the courts, through privately initiated damage actions in the case of employers' liability, and through prosecutions by inspectors in the case of occupational health and safety laws.[52] It was only in the twentieth century that there was a substantial increase in executive and administrative authority. As a result of this, and the fact that the Canadian courts did not undergo a period of instrumentalism in the nineteenth century, they did not have as much institutional turf to defend as did their American counterparts.[53] Indeed, there are no reported nineteenth century Canadian cases which indicate that the courts here went through a period of informal activism in which they imposed procedural requirements to limit the exercise of delegated state power.[54]

With respect to England, the bourgeoisie established their political dominance through a revolt against the absolutist state. *Laissez-faire* liberalism became the established economic policy and was fully embraced by the judiciary. Indeed, it was perhaps more fully embraced by the judiciary than by House of Commons which, by the nineteenth century, was regularly confronted with demands for state intervention arising out of the dislocations caused by

---

[51]See Benidickson, *supra*, note 68 at 385-6.

[52]See Tucker, *supra*, note 46.

[53]Of course, I do not mean to suggest that Canadian courts never resisted the expansion of state power. Nor have I overlooked the fact that the courts were able to review legislation on the basis of whether the enacting legislature had constitutional competence with respect to the matter. Indeed, at times, the courts used the division of powers to frustrate both federal and provincial efforts to respond to political and economic crises. Commenting in the 1930s on recent division of powers cases, F.R. Scott wrote, "It would seem that even without special mention in the British North America Act, the doctrines of *laissez-faire* are in practice receiving ample protection from the courts." F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: U. of T. Press, 1977) at 101.

[54]The first Canadian citation of *Cooper*, *supra*, note 14, that I could find was *Tourangeau* v. *Township of Sandwich West* (1920), 48 O.L.R. 306. That case involved an arbitrator appointed pursuant to the *Dog Tax and Sheep Protection Act*, hardly a substantial regulatory initiative by the state. In an earlier Canadian case, *R.* v. *Simpson* (1880), 20 N.B.R. 472, the court held that it only had authority to grant *certiorari* in relation to judicial acts.

urbanization and industrialization. The judiciary resisted these reforms in the later part of the nineteenth century with the tools that were available to them, including, of course, the power to impose the requirements of natural justice.[55] The decline of English judicial activism with respect to procedural requirements in the early twentieth century was, in part, related to the relatively thin constitutional foundation for their intervention. It also reflected political changes which had a direct impact on the courts' internal functioning. Governments were becoming increasingly intolerant of judicial interference and were increasingly willing to put matters beyond the purview of the courts.[56] As well, the government was better able to control the House of Lords, the highest appeal court. According to Stevens, the Liberals became obsessed with the fear that the courts would interfere with the workings of government after their attack on trade unions. As a result, they deliberately tried to thwart the development of an activist administrative law.[57] One step they took was the appointment of Lord Haldane as Lord Chancellor of Asquith, presumably on the basis that he was sympathetic to the Liberal's views. According to Stevens, Lord Haldane selected the panel of law lords who heard *Local Government Board* v. *Arlidge*,[58] a case which marked a more limited role for the court in supervising the executive branch of government. Not surprisingly, the panel consisted of lords who were or had been active Liberal politicians.[59]

Other factors have been suggested to explain the retreat to formal inactivism. For example, under the nineteenth century law,

---

[55]The response of the English courts to early administrative schemes is examined by H.W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in 19th Century England* (Toronto: U. of T. Press, 1984), c. 5, who concludes at page 147: "On balance, while judicial review did assist various administrative actors from time to time, it tended to be a negative influence. Decisions were often unsympathetic, even hostile to the new interventionist philosophy; sometimes they were insensitive to the procedural, evidentiary, and institutional qualities that distinguished regulatory legislation from criminal law...."

[56]Stevens, *supra*, note 42 at 67.

[57]*Ibid.* at 198.

[58][1915] A.C. 120.

[59]*Ibid.*

informalism at the threshold meant that the categories of interests that merited protection were open-ended. Individuals with non-traditional interests such as licensees began to come forward claiming that they were entitled to procedural fairness as a condition precedent to the exercise of state power. Craig argues that the "judicial conclusion that the substantive interests at stake were not worthy of procedural protection."[60] played a significant role in the development of a formalist jurisprudence limiting the application of the principles of natural justice.

The point of this brief comparative analysis is not to dispute that the English and Canadian courts adopted a predominantly formal inactivist stance in administrative law in the first decades of the twentieth century.[61] Nor is it to provide a detailed account of the process of legal change in a particular country. Rather, the major point is that we cannot explain these changes primarily on the basis that substantive rationality was antithetical to legal legitimacy and that the courts finally realized this. It was not just the informalist structure of the law itself that was generating tension. Indeed, if that were the case, informal activism might have been replaced by formal activism. What was also problematic was the content and function of the law itself, not that its normative premises could be thematized in judicial discourse. In the face of increasing demands that the state play a wider role in facilitating accumulation and achieving minimally acceptable levels of social welfare, it was becoming more difficult to defend extensive and intensive judicial supervision of the procedures followed by public authorities based on the premises of *laissez-faire* ideology. That ideology and practice was on the wane outside of the law; continued reliance on its premises inside the law was problematic even when those premises were embedded in formal structures, as was the case in contract law.[62] It was even more problematic in an area of the law which was substantively rational in its form and therefore

---

[60]Craig, *supra*, note 11 at 263.

[61]It is important to always remember that at any time, the courts may be employing a patchwork of legal forms and exercising various levels of activism. Generalizations should be, therefore, carefully qualified.

[62]See Atiyah, *supra*, note 55, who traces the decline of classical contract theory from 1870.

depended directly on the normative validity of that ideology for its legitimacy.[63]

B. *The Period of Inactive Formalism*

Formal rationality became the dominant mode of law in the area of procedural fairness review in the post-World War I period. There was a high level of norm generality, insofar as the courts were able to refer to a few clear rules to determine whether the body in question was amenable to certiorari, and therefore under a duty to comply with the requirements of natural justice as a condition precedent to the valid exercise of its powers. As well, there was a high level of norm differentiation insofar as the legal rules were intrinsic to the legal system.

However, the fact that the law was rational in its form does not mean that it was autonomous. Indeed, in terms of functional compatibility, formally rational inactivism fitted comfortably with emerging principles of administrative organization and legitimacy. In this regard, we might mention two models of bureaucracy that were becoming increasingly common.[64] The first was the democratic formalist model which envisaged the bureaucracy as the servant of democratically elected governments. The lines of command flowed from the electorate to Parliament to the executive, while the lines of accountability followed back downwards to the people. The bureaucracy could be conceptualized as the genie that was simply carrying out the commands and implementing the rules of its political master. This democratic "transmission belt"[65] legitimated

---

[63] "There are, of course, common law standards of reasonableness and some common law rules purporting to elucidate the requirements of public policy. These, however, bear the deep imprint of *laissez-faire* philosophy and are misleading rather than helpful in expounding present day legislation." J.A. Corry, "The Genesis and Nature of Boards" in J. Willis, ed., *Canadian Boards at Work* (Toronto: Macmillan, 1941) xvii at xxxv-xxxvi.

[64] A far more elaborate account of these models can be found in Frug, *supra*, note 6 at 1297-9, 1318-20.

[65] "The administrative machinery...is not unlike the machinery which is used in mechanics to transmit power, from its motor source to the point where it is brought into contact with the raw material requiring its application." A.A. Berle, "The Expansion of American Administrative Law" (1917) 30 Harv. L. Rev. 430 at 434. Also see R.B. Stewart, "The Reformation of

the exercise of delegated authority by various officials.[66] The second, and historically latter one, was the expertise model. Parliament delegated broad power to a quasi-independent body to regulate in the public interest. Here the legitimating principle was technocracy. The assumption was there was an overriding public interest identifiable by non-political experts acting within the realm of their expertise. Here the administrative apparatus was analogized to the army. Parliament democratically made the decision to go to war, but the strategy and tactics of the campaign were not laid out in advance. "The concrete measures to be taken are largely a matter of expert judgment, subject to revision in the face of unexpected obstacles and changing circumstances."[67]

Formally rational, inactivist law was functionally compatible with both these models of bureaucracy. It was compatible with democratic formalist bureaucracy insofar as it restrictively defined the role of judicial supervision of procedural requirements to those situations where the legislature had already imposed "judicial trappings." In effect, this approach recognized that the choice of procedure was a political matter. The role of the courts was to interpret and enforce the law that was properly enacted by the legislature. It that sense, the courts were also just genies carrying out the will of their political masters. With respect to the expertise model, judicial inactivism was functional insofar as it insulated experts from unwanted external interference. It allowed them to develop procedural techniques which, in their expert view, would best facilitate the realization of the public interest. There was no

---

American Administrative Law" (1975) 88 Harv. L. Rev. 1669.

[66]Thus in *Arlidge*, *supra*, note 77 at 136, Lord Shaw stated: "My Lords, how can the judiciary be blind to the well-known facts applicable not only to the constitution but to the working of such branches of the executive? The department is represented in Parliament by its responsible head. On the one hand he manages its affairs with such assistance as the Treasury sanctions, and on the other he becomes answerable in Parliament for every departmental act."

[67]J.A. Corry, *supra*, note 82 at xxi.

presumption in favour of adversary adjudication.[68] Furthermore, by restricting its jurisdiction to supervise procedures only to those bodies required to formally adjudicate disputes between parties, the courts could claim that they too were acting within a realm in which they possessed expertise.

The legitimacy of this structure of procedural fairness review was, in part, dependent on the legitimacy of the bureaucratic models it serviced. Restricting the supervisory powers of the courts to situations in which statutes required adversarial adjudication is legitimate only insofar as the choice of process is seen to be a question of politics, and not a question of law. In this regard, legal formality mirrored both bureaucratic formality and bureaucratic expertise, and the legitimacy of the former was linked to the legitimacy of the latter. As well, formally rational law was, or at least had been recently, the predominant form of private law. The courts could draw upon that private law tradition to defend the extension of formalism into public law.

Thus to summarize, the shift from substantively (ir)rational activism to formally rational inactivism is the outcome of a complex interaction between law, state, and the economy. Structural and political pressures generated out of the inability of the market economy to sustain conditions favourable to accumulation and legitimation led to pressure for expanded state involvement in steering the economy and maintaining minimally acceptable levels of social welfare. The expansion of state power necessitated the growth of bureaucratic apparatuses, which were legitimated both politically and functionally. An activist law of judicial review of procedures, substantively rooted in the premises of *laissez-faire* capitalism, was a particularly vulnerable structure upon which to sustain a judicial campaign that could resist these changes or force them into procedural moulds preferred by the courts. Inactive formalism was functionally compatible with these changes and could be easily defended on traditional grounds as well as on the basis of

---

[68] "The course of proceedings which nine centuries of legal history have elevated to the position of 'natural justice' in the hearing of the homogeneous class of disputes that are handled by courts has little, if any, application to any one of the multifarious types of investigation that are today conducted by administrative tribunals." J. Willis, "Introduction," in Willis, *supra*, note 82 at 116-17.

its consistency with the values of the emerging social ordering process.[69]

C. *The Re-Emergence of Informal Activism*

This leads us to consider the third doctrinal shift described earlier, the revival of a broad, substantively rational, fairness doctrine. Under this doctrine, the courts have a broad jurisdiction to review the procedures of state authorities performing a wide range of functions. Because of this, no single procedural paradigm is appropriate for all situations, and the courts must decide what fairness requires in the circumstances. Once again, the law exhibits a low level of norm generality and the values that are invoked in weighing and balancing the competing interests at stake are not highly differentiated from the values of other sub-systems. Thus there is a low level of norm differentiation. In short, the decisions of the courts often look political.

Loughlin identified two reasons for the failure of the formal inactivist solution: 1) the test as to whether the rules of natural justice were to apply were not as simple or as rational and objective as one might at first have believed; and 2) the process of formal classification led to results in a number of cases that generally were perceived as having worked injustice.[70] The first reason refers to an internal difficulty in the realization of legal formalism. The courts could not frame a self-applying definition of a judicial function. The second points toward a substantive failure, either at the level of legal justification, of function, or of both. However, Loughlin fails to capitalize fully on this later insight to explain the shift in the law. Nor does he consider its implications for the framework he has been relying upon implicitly. In particular, his recognition that the practice of formalism eventually led to substantive criticisms of the

---

[69]Note that I am not making the claim that judicial or common law legitimated these processes. Indeed, quite the opposite. My analysis suggests that these processes were, in large part, legitimated independently of the law, and that the law drew legitimacy from its functional compatibility with them, as well as from its own processes and traditions. In turn, legal affirmation of administrative processes lent them additional legitimacy.

[70]Loughlin, *supra*, note 1 at 222 (footnotes omitted).

court's work undermines his initial assumption about the narrow range of acceptable justifications for legal action available in the modern legal order. Formal justifications for legal action, or in this case, inaction, may not be sufficient to sustain legal legitimacy in the face of unacceptable outcomes. The ability of the courts to shift to an alternate mode of rationality may in fact count as a strength of the liberal legal order insofar as it facilitates the maintenance of a high level of functional compatibility between the legal system and other sub-systems.

The importance of examining the relation between what initially appear as internal legal difficulties and functional demands to understand the generation and resolution of tensions in the law is illustrated by examining the relationship between the two reasons given by Loughlin for the shift in *Ridge*, something which Loughlin does not attempt. Let us begin with the problem of formality. There can be no doubt that it was a difficult task to develop general rules that possessed a high degree of certainty for determining what constituted a judicial function.[71] However, it could be done and, to a significant extent, was done, but at a cost. For example, the tests laid out in *Nakkuda Ali* and *Copithorne* exhibited a high level of generality and certainty. It was not particularly difficult to determine whether a body was: a) exercising legal authority; b) determining rather than recommending or investigating; c) affecting legal rights rather than privileges; or d) under a duty to act judicially; so long as the test was whether the legislation itself had cloaked the decision maker with judicial trappings. True, there were still some difficult cases because administrative arrangements do not always fall neatly within pre-conceived categories. What was even more unsatisfactory about this formal legal test, however, was that it failed to attach procedural requirements to the full range of functions which, according to many, required them. Indeed, dissatisfaction with this solution was only partially focused on the limited concept of a judicial function that it embodied. More fundamentally, there were demands that the court become involved in supervising the fairness of procedures

---

[71] For a discussion of the characteristics of legal formality, see Kennedy, "Form and Substance in Private Law Adjudication" and "Legal Formality," *supra*, note 6.

used in a broad range of government functions regardless of their characterization. Because the doctrinal structure of the law required a threshold characterization of the function as judicial to establish the jurisdiction of the court to supervise procedures, the characterization issue had to bear the brunt of this pressure. The incoherence of the case law on this distinction was as much a function of the pressure brought to bear on it because of doubts about the desirability of making such a distinction at all, as it was a function of some objective difficulty in drafting rules that captured an agreed understanding of what constituted a judicial function.

We can illustrate this tension in the development of Canadian law in the late 1960s and early 1970s. In cases such as *Wiswell*[72] and *Lazarov*,[73] the courts began to develop a more functional approach to the categorization problem. They examined the nature of the interest at stake, the circumstances in which the power could be exercised, the impact of the action on the interest, and the needs of the administration in operating effectively. However, the adoption of this approach made it increasingly apparent that the label attached to a function was conclusory. The real question being addressed was whether the court thought that the body under review arrived at its decision in a procedurally fair manner, taking into account the factors mentioned above.[74] Once the courts took this step, they were only one short stride away from *Nicholson* and the decline, if not the elimination, of the significance of the characterization of the function as judicial as opposed to administrative.

We have linked a crisis of coherence in the internal structure of formal law to external pressure generated by a demand for greater judicial supervision of administrative procedure. Next, it

---

[72]*Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512 [hereinafter *Wiswell*].

[73]*Supra*, note 25.

[74]We should note that in some instances the procedural point is probably less important for the court than the substantive outcome. A court that is unhappy with the regulatory program may raise procedural hurdles that will clearly impair the ability of its administrators to achieve its objectives. These concerns can easily be accommodated by a jurisprudence which invites the courts to assess the circumstances in which the power can be exercised and the impact on the interests of citizens and corporations.

is necessary to develop an account of the development of that external pressure and its transmission to the legal system. This is particularly important because earlier we explained the emergence of formal inactivism, the predominant form of procedural fairness review, as, at least in part, a response to pressure to create enhanced state administrative capacities, arising from the experience of class conflict, social and economic complexity, and external crises. In seeking to understand why there was pressure for further change, it will be useful to ask why the bureaucratic responses we observed fail to resolve the problems of liberal-capitalist social formations that engendered them.

Obviously, a complete and adequate account of those processes is beyond the scope of this paper, but we might briefly suggest some of its principal components. First, there was a steady increase in the rate of enactment of regulatory statutes throughout the 1960s and 1970s at the provincial level, and a marked increase in the rate of enactment of federal regulatory statutes in the 1970s. As well, there was an even greater growth in the promulgation of subordinate legislation during this period.[75] The numbers of statutes and regulations do not, however, tell the whole story. There was also a change in the scope and subject matter of regulation. With respect to its scope, regulation moved beyond policing and complementing limited aspects of private, market-oriented economic behaviour and took on adjustive and planning functions which replaced the institution of the market.[76] Further, the subject matter of regulation also expanded as the dysfunctional consequences of the accumulation process became more widespread and impinged on the lives of middle income citizens. The growth of "social" or "quality" regulation such as environmental and consumer protection

---

[75] *Responsible Regulation*, *supra*, note 61 at 15-18.

[76] For general discussions of these developments, see J. Habermas, *Legitimation Crisis*, *supra*, note 43 at 50-55, and C. Offe, "The Theory of the Capitalist State and the Problem of Policy Formation" in L. Lindberg *et al.*, eds *Stress and Contradiction in Modern Capitalism: Public Policy and the Theory of the State* (Lexington, Mass.: Lexington Books, 1975) 125 at 127-34. For similar observations about these changes in Canada, see R. Schultz, "Regulatory Agencies and the Dilemmas of Delegation" in O.P. Dwivedi, ed., *The Administrative State in Canada: Essays in Honour of J.E. Hodgett* (Toronto: U. of T. Press, 1982) 89 at 91-93.

laws is evidence of this development.[77] The causes of this growth in the quantity, scope, and subject matter of state regulation are obviously quite complex. In part, however, we can attribute it to structural problems of capitalist accumulation and legitimation, and the inadequacy of the earlier responses to manage these crisis tendencies.[78]

The failure of the formal and expertise models of bureaucracy to resolve crisis tendencies in advanced capitalism is related to the inadequacy of these structures in relation to the new functional tasks imposed on the state. According to Offe, the formal model of bureaucracy is an unsuitable structure for the performance of productive state activities.[79] This is in part a function of the problem of overload.[80] The mechanisms for generating external rules that would govern outcomes could not keep pace with the demand for their production as the range of subject matters to be dealt with expanded. As well, the rigidity of a bureaucracy governed by fixed rules became increasingly dysfunctional as the complexity and rate of change in the external environment increased. Furthermore, even if political inputs could be efficiently fashioned, the mechanisms of political accountability between the government and Parliament, and between the

---

[77]For a discussion of this distinction, see *Responsible Regulation*, *supra*, note 61 at 44-45.

[78]For an excellent overview of Marxist theories which explore this phenomenon, see M. Carnoy, *The State and Political Theory* (Princeton: Princeton U.P., 1984).

[79]"[T]o the extent that bureaucracies are employed as organizational structures dealing with the performance of productive state activities, they are neither effective nor efficient and hence produce outcomes that are insufficient in quality and quantity, relative to the functional requirements of the accumulation process in advanced capitalism." Offe, *supra*, note 95 at 142.

[80]The overload thesis is explored by C. Offe in J. Keane, ed., *Contradictions of the Welfare State* (Cambridge: MIT Press, 1984) c. 2. Its significance for Canada was emphasized by Robert C. Stanfield, former leader of the Progressive Conservative Party of Canada in "The Present State of the Legislative Process in Canada: Myths and Realities" in W.A.W. Neilsen & J.C. MacPherson, eds *The Legislative Process in Canada: The Need for Reform* (Montreal: Institute for Research on Public Policy, 1978) c. 2.

government and the civil service, were seen to be less than adequate.[81]

Formal bureaucracy was also criticized for its inadequacies in relation to non-productive state functions. Bodies that administered social assistance and social insurance programs were and are routinely criticized for adhering to rules which fail to address the individual needs of claimants. Images of an anonymous bureaucracy whose rules are unknown to the public and which only allows the public to have direct contact with powerless clerks with limited authority have been part of our popular culture for most of this century.[82]

Another explanation for the failure of the formal model develops from its potential implication for the expansion of the realm of direct political decision making. The argument here is not that legislative bodies are functionally inadequate in a technical sense, but rather that the identification of the location of decision-making power in a democratically elected body will be functionally inadequate in a political sense. That is, the capitalist state will fail to facilitate accumulation because democratically elected legislatures will prevent it from doing so. Liberals, such as J.S. Mill,[83] and Marxists[84] share the belief there is substantial potential for incompatibility between mass political democracy and capitalism. In theory, workers could capture the legislative branch of government and use the formally rational bureaucracy to extend its control over the private economy. Even if they did not succeed, the location of decision-making power in Parliament could intensify the conflict between the requirements of accumulation and legitimation.

---

[81]Problems of accountability are a dominant theme of the essays in *The Administrative State in Canada, supra*, note 95. See particularly J.R. Mallory, "Curtailing 'Divine Right': The Control of Delegated Legislation in Canada" at 131 and O.P. Dwivedi, "On Holding Public Servants Accountable" at 151.

[82]The classic cultural expression of this image is F. Kafka, *The Trial*, trans. W. Muir (New York: Vintage, 1969).

[83]J.S. Mill, *Considerations on Representative Government*, (Oxford: Oxford U.P., 1975) c. 8.

[84]See for example, K. Marx, *Class Struggles in France 1848-1850* (New York: International Publ., 1964) who explains the demise of universal suffrage in France in 1850 on the basis that it threatened bourgeois rule.

We can explain the development of the expert or substantively rational bureaucratic model, in part, as an attempt to overcome the problems identified in the formal model. With respect to the political problem, there are a variety of factors and strategies which can reduce the tensions between political democracies and capitalist economies, including the imposition of constitutional limits on state power. A less drastic alternative is to shift power to a bureaucracy in such a way that it is no longer directly dependent on political inputs, nor directly accountable to the legislature. In other words, by severing the transmission belt, at least partially, the state can more easily be constrained by dominant classes.[85] With respect to the efficiency problem, the expert model held out the promise of relieving the bureaucracy of an institutional dependence on structures that could not respond adequately to the complex and fluid environment. It would allow the bureaucracy to engage in problem-solving modes of operation. Discretionary power could provide the flexibility necessary to achieve substantively rational results.

However, the expertise model had its own limitations. In particular, the application of expertise to the resolution of problems presupposes that the goals of purposive action could be identified and would remain relatively stable. The belief that we had reached "the end of ideology"[86] and that there was an overriding public interest identifiable by experts was short-lived. The state was regularly confronted with a great variety of needs, interests, and demands which, at best, were only partially, and temporarily

---

[85]The classic Marxist formulation of this thesis is Lenin's: "Take any parliamentary country, from America to Switzerland, from France to Britain, Norway and so forth - in these countries the real business of 'state' is performed behind the scenes and is carried on by the departments, chancelleries and General Staffs. Parliament is given up to talk for the special purpose of fooling the common people." V. Lenin, "State and Revolution" (1917) in James E. Connor, ed., *Lenin on Politics and Revolution: Selected Writings* (New York: Pegasus, 1968) 184 at 211. It is interesting to note that although Weberians do not link the decline of parliamentarianism and the growth of bureaucracy to class conflict (for example, see A. Paul Pross, "Space, Function and Interest: The Problem of Legitimacy in the Canadian State" in *The Administrative State in Canada*, *supra*, note 95 at 107), Weber himself agreed with Lenin that in the absence of a strong working parliament, bureaucratic dominance would strengthen the influence and control of capital over the state. For an interesting comparison of Weber's and Lenin's views, see E.O. Wright, *supra*, note 59, c. 4.

[86]For a useful collection of some of the important contributions to this debate see C. Waxman, ed., *The End of Ideology Debate* (New York: Simon-Shuster, 1969).

reconcilable. As a result, the distinction between politics and administration was becoming increasingly blurred. Agencies themselves needed to build political bases to support policies.[87] Furthermore, even if there was an identifiable public interest, numerous commentators expressed doubt about the capacity of expert, independent administrative agencies to identify and give effect to that interest. Theories of regulatory failure abounded. They included original capture,[88] agency life cycle,[89] elite accommodation,[90] clientism,[91] and the claim that the government was not appointing experts, but rather its political friends.[92] In more traditional areas of regulation, there was also an attack on the existence of discretionary power. Why did one claimant receive supplementary benefits and not another? No rule could be invoked to explain this difference. It was a matter of "judgment."[93]

Furthermore, if expert agencies fail to achieve common goals, either because common goals do not exist or because agencies are unable to identify and implement them, then they cannot fall back on democratic or legal legitimation principles. Indeed, the de-

---

[87]See Alan Wolfe, *The Limits of Legitimacy* (New York: Free Press, 1977) at 264.

[88]*Supra*, note 63.

[89]M.H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton U. P., 1955). For a review of the literature questioning the applicability of this thesis to Canada see R.D. Cairns, *Rationales for Regulation* (Ottawa: Economic Council of Canada, Technical Report No. 2, 1980) 18-19. In this regard also see D.A. Townsend, *An Examination of the Life Cycle/Capture Hypothesis and its Potential Application to Canadian Independent Regulatory Agencies* (Master of Laws, Osgoode Hall Law School, 1982) [unpublished].

[90]R.V. Presthus, *Elite Accommodation in Canadian Politics* (Toronto: Macmillan, 1973) at 211-26.

[91]W.D. Coleman, "The Capitalist Class and the State: Changing Roles of Business Interest Associations" (1986) 20 Studies in Pol. Eco. 135.

[92]For an extensive catalogue, see B.M. Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (New York: Columbia University Press, 1980) c. 3.

[93]For discussions of the attack on discretion in welfare decision making and its consequences, see I. McKenna, "The Legalisation of Supplementary Benefits - More Power to the Claimant?" [1985] Public Law 455 and W.H. Simon, "Legality, Bureaucracy, and Class in the Welfare System" (1983) 92 Yale L.J. 1198.

legalization of bureaucracy, once thought functionally necessary, now undermines the legitimacy of its decisions.

If formally structured administrative agencies are functionally inadequate because their political inputs are of insufficient quantity or quality, and if expert agencies are unable to fulfill their function because there are no technocratic solutions to social and economic problems, or because of the conversion of private power into state power, then one solution is to change the procedures followed by the agency in exercising its powers. The extension of the right to be heard allows groups affected by agency action, or inaction, the opportunity to have direct input into agency decisions. Participation of this sort responds to the defects in the formal model by supplementing or usurping the traditional, but impaired channels of political accountability. It responds to defects in the expertise model either by rejecting it in favour of politics, or, alternatively, by acting as an antidote to the problem of capture that supposedly defeated the achievement of the public interest. The "open" agency model is, on one level, an attempt to improve the output of regulatory agencies by broadening its inputs. This is also true for authorities administering social insurance and social assistance programmes, disciplinary programmes, and immigration programmes, and who make individual assessments of entitlement and deservedness.

The emergence of procedural fairness in decision making is not just explained and defended because of its substantive benefits. The inability of administrative bodies to manage crisis tendencies was not just a result of structures that were functionally inadequate. There is also the problem of legitimation. Formal democratic and public interest expertise legitimation stories were increasingly read as fictional accounts of bureaucratic life. Furthermore, the persistence of dysfunctional outcomes for some groups reduced the availability of functional legitimation. The decline of political and functional legitimations left a legitimation deficit that needed to be addressed. At the same time, constraints limited the alternatives. According to Mandel, "increasing recourse must be made to forms of legitimation that are abstract in the sense that they do not depend on meeting people's concrete needs and that avoid genuine participatory democracy, even in the public sphere, which in the context of state involvement in the economy might endanger the

freedom to accumulate."[94] Procedural fairness could provide, potentially, a new source of legitimations that met these constraints.

Procedural fairness is also supported from a conservative political perspective in which state intervention is viewed as an infringement on individual liberty. Where political support for the dismantling of some state apparatuses might be weak, or where the need for state interventions is accepted, procedural fairness is demanded as a basic requirement for the preservation of individual rights. Indeed, procedural fairness becomes a necessary, but not necessarily sufficient, condition for the exercise of necessary or unshirkable state power. An excellent example of this impetus for fairness in Canada is *The Citizens' Code of Regulatory Fairness*, issued by the Federal Department of Justice as part of its regulatory reform strategy. The ideological premises of this exercise are revealed in the first sentence of the preface to the Code: "When a government regulates, it limits the freedom of the individual." Not only does the Code promise to give citizens "a full opportunity for consultation and participation" in the regulatory process, it also enshrines the principle that government will exercise restraint in its use of regulatory powers.[95]

Procedural fairness, however, was not just a response initiated from above. There were increasing pressures to expand participation in administrative decision making coming from below. In the words of Lowi, "every delegation of discretion away from electorally responsible levels of government to professional career administrative agencies is a calculated risk because politics will always flow to the point of discretion; the demand for representation would take place at the point of discretion"[96] This was true not just of traditional interest groups, but also of the poor, who, in the aftermath of the Keynesian compromise, saw themselves as holding legally protected interests in their benefits, and who, in

---

[94] M. Mandel, "The Legalization of Prison Discipline in Canada" (1986) 26 Crime and Social Justice 79 at 86.

[95] *The Citizens' Code of Regulatory Fairness*, (Ottawa: Department of Justice, 1986).

[96] T.J. Lowi, "Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power" (1986) 36 American U. L. Rev. 295 at 297.

some circumstances, organized to pursue their claims through political and legal action.[97]

Of course, proceduralist solutions were not necessarily the major goal of these movements. Substantive reforms were also pursued, and sometimes achieved. However, we need to examine why substantive goals were often translated into procedural reform. An obvious possibility is that it was often easier to obtain procedural rather than substantive reform. If the state was under pressure to make concessions, it was cheaper to make procedural concessions than substantive improvements. Further, procedural reform offered elites an opportunity to reintegrate discontented groups into more regular institutional channels of political action. Once the agency doors were opened, it became possible to defend the legitimacy of administrative decisions by pointing to the opportunities provided for participation in the decision-making process. Losers who believed the process was fair might be more willing to accept the outcome.[98] The modern development of the procedural fairness in bureaucracies is not a simple story, and it certainly is not just a tale of judicial activism. Some administrative agencies initiated open processes without much external prompting. The best known instance of this phenomenon is the Canadian Radio-Television and Telecommunications Commission (CRTC).[99]

---

[97]The classic American account of these developments is F. Piven & R. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (New York: Vintage, 1979).

[98]Numerous authors have emphasized the legitimation effects of procedural fairness. For example, see J.O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (Cambridge, Eng.: Cambridge U.P., 1978) c. 10; J.L. Mashaw, "Administrative Due Process: The Quest For A Dignitary Theory" (1981) 61 Bos. U. L. Rev. 885; and R.S. Summers, "Evaluating and Improving Legal Process - A Plea for 'Process Values'" (1974) 60 Cornell L. Rev. 1.

Similar arguments have been made in defence of the collective bargaining system. "A principal objective of the collective bargaining system is to provide workers with a means of participating, either directly or through their chosen representatives, in the determination of their terms and conditions of employment. The collective bargaining process becomes a means of legitimizing and making more acceptable the superior-subordinate nexus inherent in the employer-employee relationship." Canada, Task Force on Industrial Relation, *Canadian Industrial Relations* (Ottawa: Queen's Printer, 1969) at 95, para. 291.

[99]For example, see Law Reform Commission of Canada, *Public Participation in the Administrative Process*, by David Fox (Ottawa: Law Reform Commission of Canada, 1979) at 9-35. For a critical assessment of the performance of the CRTC which suggests that the CRTC is a captured agency notwithstanding public participation in its processes, see H. Hardin, *Closed Circuits: The Sellout of Canadian Television* (Vancouver: Douglas & McIntyre, 1985).

In other cases, the legislature took the initiative, either by enacting general procedural codes, as in the case of the *Statutory Powers Procedure Act*[100] in Ontario, or by enacting procedures tailored to fit the needs of particular statutory authorities.[101] And, of course, sometimes procedural requirements were imposed by the courts in the face of an authority's unwillingness to open up its process,[102] or indeed, in the face of an apparent legislative determination, not to require a more open process.[103]

While our primary concern is with this revival of judicial activism in reviewing the procedures followed by public authorities, it is important to keep in mind this larger context. It suggests that, to a significant extent, the development of an informal activist approach was functionally compatible with developments in the welfare state. The qualified nature of this statement is intentional. It recognizes that the developments identified here only represent tendencies in a highly complex and, at times, contradictory process of adjustment and change within advanced capitalist social formations. As well, procedural fairness review by the courts has not developed in a process of unilinear evolution and, at times, the courts have been in conflict with other branches of the state. Furthermore, we cannot explain the motivation for increased judicial intervention simply by pointing to functional and legitimation deficits in the earlier models of administrative regulation, although some of the justification for judicial inactivism rested on the credibility of those regulatory models.

One starting point for an assessment of the particular motivation for a revival of judicial activism is Loughlin's observation that there was a perception that injustices were resulting from the operation of the inactivist formal model of judicial review. For

---

[100] R.S.O. 1980, c. 484 [hereinafter the *SPPA*].

[101] For example, at the same time that the *SPPA* was enacted, the Ontario legislature also amended a multitude of individual statutes by the *Civil Rights Statute Law Amendment Act, 1971*, S.O. 1971, c. 50.

[102] For example, see *Lazarov*, *supra*, note 25.

[103] For example, see *Re Downing and Graydon* (1978), 92 D.L.R. (3d) 355 (Ont. C.A.). Of course, I am referring to judicial review prior to the *Charter*.

example, adherence to formal reasoning at times led the court to deny procedural protection to holders of traditional private property interests.[104] To those judges of a conservative bent, these results must have seemed both unjust and dysfunctional. Therefore, it was not surprising that, in at least some cases, formal constraints were loosened or evaded to provide relief to private property owners adversely affected by administrative action.[105] From this perspective, renewed judicial activism was not a positive response to the sagging legitimacy of existing regulatory models, but rather an occasion for the courts to re-assert their traditional conservative agenda, which had been subordinated, but not erased, during the period of accommodation.[106]

However, this explanation is not sufficient to understand the extension of procedural fairness review into areas of administrative action that do not touch private property interests, including the treatment of public employees (especially police),[107] recipients of various income support and assistance benefits,[108] and prisoners.[109] Clearly, the courts recognized that in the Keynesian welfare state, any expression of a commitment to the legal protection of individual rights had to go beyond the protection of traditional property rights if it was to be credible. Whether thought of as "new property,"[110]

---

[104] See, for example, *Copithorne, supra*, note 17.

[105] For example, even in the pre-*Ridge* period, the courts sometimes overcame the formal hurdles to the imposition of procedural requirements in order to protect property rights. For example, see *Knapman* v. *Board of Health for Saltfleet Township*, [1954] 3 D.L.R. 760 (Ont. H.C.).

[106] For a particularly strong affirmation of the procedural rights of private property owners, see the dissent of Dickson, J. (as he was then) in *Homex Realty and Development Co. Ltd* v. *Village of Wyoming*, [1980] 2 S.C.R. 1011 at 1041.

[107] It is interesting to note that both in England and Canada, the landmark procedural fairness cases both involved claims by police officers. See *Ridge, supra*, note 20 (England) and *Nicholson, supra*, note 22 (Canada). It is no longer contumacious to suggest that the courts have a special concern for the police, although it may be unprofessional. See *R.* v. *Kopyto*, [1987] O.J. No. 1052, C.A. No. 969/86 (November 27, 1987) [unreported].

[108] *Re Webb and Ontario Housing Corporation* (1978), 93 D.L.R. (3d) 187 (Ont. C.A.).

[109] *Martineau* v. *Matsqui Institution Disciplinary Board* (1979), [1980] 1 S.C.R. 602.

[110] C.A. Reich, "The New Property" (1964) 73 Yale L.J. 733.

or simply as rights enhancing the dignity and autonomy of the individual, liberals on the bench became willing to extend procedural protections to those rights holders, even if that resulted in the judicial supervision of the procedures of administrative authorities in contexts that had traditionally been outside of the courts' purview.[111]

Thus, in sum, we can see that changes in the social formation put pressure on the state to expand its capacities. Existing regulatory models were functionally inadequate and increasingly losing their legitimacy. As a result, pressure developed on a formal conceptual distinction erected precisely to avoid a judicial confrontation with early to mid-twentieth century regulatory models. Judicial formalism served the function of creating a space for the development of substantively rational forms of public law which authorized public officials to exercise substantial discretionary powers in the pursuit of broadly defined regulatory goals. Once the legitimacy of those models faltered, so too did the legitimacy of formal inactivism. Indeed, now the tables are turned. One of the principal complaints about the welfare state is that it is insufficiently constrained by the rule of law.[112] Ironically, this occurred under the aegis of the legal form most often associated with the triumph of the rule of law, logically formal rational law. Furthermore, rule of law supporters now claim that the re-legalization of state power requires the adoption of a substantively rational approach to the review of administrative procedures. The success of this strategy, however, needs to be critically examined.

---

[111] For the view that the modern function of judicial review is the protection of individual rights against encroachment by the state, and that the behaviour of the judiciary is motivated by the desire to protect individuals from political and bureaucratic oppression, see Grey, "The Ideology of Administrative Law," *supra*, note 1. For a recent discussion of the development of procedural protections with respect to lesser interests, see R. Baldwin & D. Horne, "Expectations in a Joyless Landscape" (1986) 49 Mod. L. Rev. 685 at 692-702.

[112] For example, see F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) and T.J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: Norton, 1979). For an influential affirmation of the importance of the rule of law in the control of public authority, see Ontario, *Report of the Royal Commission Inquiry Into Civil Rights*, Report No. 1, Vol. No. 1 (Toronto: Queen's Printer, 1968).

IV. CRISIS TENDENCIES IN PROCEDURAL FAIRNESS AND THEIR CONTAINMENT

In the previous section we inquired into the development of procedural fairness review by the courts as well as the development of more participatory models of bureaucratic operations generally. These developments were seen to be, at least in part, a response to crisis tendencies in the capitalist social formation which simultaneously led to the expansion of state functions and limited the ability of the state to perform those functions and maintain its legitimacy. In this section, we want to examine briefly the adequacy of the procedural responses to these crisis tendencies. First, we will consider three criticisms of the current practice of judicial review of procedural fairness. Although rooted in different traditions, they all suggest that even if enhanced hearing rights are desirable, the courts, employing an informal activist jurisprudence, should not be the institution having major responsibility for achieving them. Next, we will consider whether a procedurally fair bureaucracy, however achieved, can resolve the systemic crisis tendencies that we observed. As well, from a progressive perspective, we will inquire into the extent to which procedural fairness creates opportunities for relatively less powerful groups to enhance their ability to influence the outcome of administrative processes, or to act directly to protect themselves.

A. *Judicial Review of Procedural Fairness*

The ability of the courts to supervise and reform the procedures followed by state administrators has been criticized on a number of grounds. Here we will review three: the crisis of declining formality, the institutional capacity of the courts, and the politics of the judiciary. Clearly, these criticisms are inter-related, but it will be useful to examine them separately.

1. Declining formality

We have already dealt with this argument in relation to the decline of an earlier period of informal activism. Here, then, we

will only review it in relation to current practice and illustrate the limited impact that it has had on rule of law adherents.[113] Loughlin argued that the chief difficulty with the informal activist approach to fairness review was that informality was inconsistent with the traditional model of the rule of law. Further, he claimed that that model provided the foundation for traditional administrative law theory. The problem with Loughlin's analysis is that it overemphasizes the role of rule formality. Rule formality was not, and is not, the overriding commitment of legal liberals or other traditional rule of law adherents.

It is true that a core notion of the rule of law is that everything must be done according to constitutionally valid law. The conception of law embraced in this model is that of a seamless web of general rules which indicate, in advance, the legal consequences of any action.[114] Historically, however, the rule of law has stood for more than just a positive conception of legality. It has embraced normative and institutional commitments. The most influential nineteenth century articulation of these commitments is in Dicey's *The Law of the Constitution.* There he identifies "at least three distinct though kindred conceptions."[115] These are: 1) that no one may be punished except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts; 2) that no man is above the law, including all officials, and that every man is subject to the ordinary law and amenable to the jurisdiction of the ordinary courts; and 3) that the general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts. Substantively, these conceptions exhibit a strong commitment to individual liberty and limited government. Doctrinally, they express hostility to discretionary power. Institutionally, they express a

---

[113]It is interesting that political scientists such as Lowi, who bemoan informalism and the decline of the rule of law through excessive delegation, see an antidote in judicial activism, but fail to consider the problem of judicial informality. For example, see Lowi, *ibid.*

[114]This definition of the rule of law has been characterized aptly as its "thin version" by A. Hutchinson & P. Monahan, "Democracy and the Rule of Law," in A. Hutchinson & P. Monahan, eds *The Rule of Law* (Toronto: Carswell, 1987) 97 at 101.

[115]A.V. Dicey, *Introduction to the Study of The Law of the Constitution*, 10th ed. by E.C.S. Wade (London: Macmillan, 1965) at 188-203.

commitment to the common law courts as the principal guardian of legality. Indeed, in each of the three conceptions, it is the common law courts that are the linchpin holding the edifice together.[116]

It was in the pursuit of these later commitments that the courts departed from the model of legal formality to expand its jurisdiction to subject public authorities to their view of the requirements of procedural fairness. Indeed, judicial review of the fairness of the procedures followed by the state in the exercise of delegated power is now seen by Dicey's followers to be a critically important component of the rule of law and the protection of individual liberty against arbitrary state power.[117] Thus, although the change from formal inactivism to informal activism was, in one sense, a departure from the rule of law, in another sense, the shift vindicated the rule of law by re-asserting the authority of its institutional guardian, the courts, to protect individual liberty. Informality in the law of judicial review is tolerable if it preserves judicial control.[118]

In Canada this defence of the new fairness jurisprudence has been most clearly articulated by Julius Grey. His support for judicial review for fairness springs from a fear of the new Leviathan. In a commentary on *Nicholson*, Grey started from the premise that "[i]n the 1960s and 1970s the role of government in everyday life grew by leaps and bounds. Officials began to hold and exercise power of a scale hitherto unknown."[119] In the face of this ominous development there was a need for more judicial review. The old

---

[116]The centrality of the ordinary law and the ordinary courts in the Diceyean conception of the rule of law is emphasized by H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

[117]"Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable." Wade, *supra*, note 1 at 413.

[118]The leading contemporary English exponent of this view is Wade, *supra*, note 1. He is even more tolerant of judicial creativity in controlling the substance of the exercise of discretionary powers. *Ibid.* at 348. The legal theories which support this role for the courts have been characterized as "red light theories" in C. Harlow & R. Rawlings, *Law and Administration* (London: Weidenfeld and Nicolson, 1984) c. 1.

[119]J.H. Grey, "The Duty to Act Fairly After *Nicholson*" (1980) 25 McGill L.J. 598 [hereinafter "The Duty"].

categorization of functions approach was "threatening to cause hardship and to prevent the courts from administering justice in vital areas of human endeavour."[120] The fairness doctrine had the potential to overcome these restrictions, but the courts needed to nurture it. Aside from the importance of obliterating the old distinctions between quasi-judicial and administrative functions, and eliminating archaic remedial difficulties, it was, in Grey's view, particularly important that the courts expand the fairness doctrine to encompass substantive as well as procedural grounds of review.[121] Indeed, Grey argued that the basis for a general doctrine of fairness review was already present in the law, found in the principles governing judicial review of discretion. The distinction between substantive and procedural review should, in Grey's view, be dropped and subsumed under the broader principle of fairness.

Thus for Grey, and for many contemporary rule of law advocates, the informality of the new fairness jurisprudence is of no great concern. The functional imperative for expanded judicial control, the protection of the individual from the state, simply overwhelms any possible concern about the potentially corrosive effect of informality on the legitimacy or certainty of the law. In Grey's view, these losses "would be more than offset by the gain in justice and consequent respect for the law."[122]

The failure of the spectre of informalism to generate a crisis for legal liberals does not mean that it is irrelevant to the long-term capacity of the courts to supervise administrative procedure. Indeed, Loughlin argued that the English courts exhibited a distinct reluctance to abandon formal classifications of functions.[123] According to Macdonald, "As the courts begin to realize the potential scope of the fairness doctrine they tend to retreat from a

---

[120] *Ibid.*

[121] *Ibid.* at 601-02. The idea was expanded in J.H. Grey, "Can Fairness Be Effective?" (1982) 27 McGill L.J. 360. See also Grey, "The Ideology of Administrative Law", *supra*, note 1.

[122] "The Duty," *ibid.* at 608.

[123] Loughlin, *supra*, note 1 at 230.

full embrace of its implications."[124] However, it is not clear that the courts in Canada have been as reticent as those theorists predicting an informality crisis thought they would become. The strongest evidence of judicial reticence to pursue the implications of informal activism is the consistent and continuing refusal of Canadian courts to review the procedures followed by bodies performing functions categorized as legislative. This, however, is the only area that has been hived off, and the courts have not been reticent to supervise all other administrative functions.

2. Institutional limitations

A second criticism of the practice of fairness review is that the courts lack the institutional competence to supervise, design, and implement appropriate procedures for the wide range of government activities that they supervise.

First, there is the problem of supervision. Commentators point to the many factors involved in the transformation of disputes into litigated cases before the courts.[125] Judicial review is passive and reactive. Someone must initiate proceedings to involve the courts. People treated unfairly may not be aware of their procedural rights, and, even if they are, they may not have the resources to seek and pursue a legal remedy. Because of this, judicial intervention may be sporadic and random.

Second, the courts encounter substantial difficulties in determining what constitutes a fair procedure in the circumstances. As noted earlier, current law requires the court to look at many factors to determine the requirements of fairness in a particular context. Included are the seriousness of the interest being affected, the benefits of added safeguards and the costs of those safeguards. The court must decide what weight to give to different interests and how to balance benefits and costs. Unless there are clearly articulated criteria for making these decisions, the court must make

---

[124] R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: II" (1980) 26 McGill L.J. 1 at 21 [hereinafter "Judicial Review"].

[125] The general problem of transforming disputes is discussed by W.L.F. Felstiner, R.L. Abel & A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-81) 15 Law & Soc. Rev. 631. The application of this analysis to procedural fairness review is considered by J.F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (New York: Russell Sage, 1986) at 22-32.

a somewhat subjective and impressionistic judgment. This creates problems of uncertainty and raises the question of why we should vest the courts with the responsibility for making political judgments of this sort, especially in the absence of some consensus on a theory of value.[126]

Building on this insight, and on the work of Lon Fuller, Rod Macdonald has argued against *judicial* review of procedural fairness on the following grounds:[127]

1) Implying procedural formalities is an essentially legislative rather than an adjudicative activity.
2) The litigational and remedial orientation of judicial review makes it difficult to understand whether or how general principles were applied to the particular context under review.
3) Courts tend to assume that adversarial adjudication is the paradigm against which procedural fairness is to be measured.

In his view, the courts and the adversarial process are simply inappropriate as an institution and as a method for designing fair procedures. Instead, he sees the need to develop a new institutional model of review, founded on the principle of consent and sensitive to the characteristics of different social ordering mechanisms appropriate to different contexts. Third, even if courts design appropriate procedures, they may not be able to implement them. For example, Michael Jackson[128] recently documented the failure of prison authorities to implement the decision in *Re Howard and Presiding Officer of the Inmate Disciplinary Court of Stoney Mountain*

---

[126]These themes have been explored most fully in the United States. See J.L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews* v. *Eldridge*: Three Factors in Search of a Theory of Value," *supra*, note 1. Also see Loughlin, *supra*, note 1 at 223-30 for similar observations with respect to the English experience.

[127]See generally, L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353; R.A. Macdonald, "Judicial Review", *supra*, note 143 and "A Theory of Procedural Fairness" (1981) 1 Windsor Y.B. Access Just. 3. The reasons are elaborated in "Judicial Review", *ibid.* at 8-13.

[128]M. Jackson, "The Right to Counsel in Prison Disciplinary Hearings" (1986) 20 U.B.C. L. Rev. 221 at 278-83.

Institution.[129] There the court held that prisoners are, in some circumstances, entitled to counsel in prison disciplinary hearings.

Finally, fairness jurisprudence and discourse focuses on hearing rights, whether in a judicial, administrative, or even a legislative context. At best, this imposes an obligation on the decision maker to listen with a not altogether closed mind and to respond, although a duty to give reasons is not firmly established in Canadian administrative law.[130] This limits the range of participatory rights that one can realistically seek. It does not include more popular or democratic forms of participation. For example, there is virtually no possibility that a common law court would imply a right of co-determination as a requirement of procedural fairness or fundamental justice.

I do not think that many would disagree with the assertion that some institutional limitations restrict the ability of courts to effectively review and control procedural fairness in administrative decision making. This does not, however, necessarily lead to the conclusion that the courts are institutionally inappropriate or that leaving the implied review function in their hands will generate uncontrollable crisis tendencies in the state. There is no shortage of commentators who reject the predictions of Loughlin and Macdonald. David Mullan has been one of the most consistent Canadian defenders of renewed, informal judicial review of procedural fairness. He is aware of the difficulties that a balancing test creates for the court, but he has faith in the ability of the courts to handle the challenge. This faith is supported by his belief that there is an underlying consensus on the goals and values in this area of the legal system. According to Mullan, the principal value of procedural fairness lies chiefly in its contribution to improving the quality of decisions. Further, he believes the courts have the capacity to design procedures which will achieve this goal. As long

---

[129](1985), 19 D.L.R. (4th) 502 (F.C.A.D.).

[130]The restricted nature of the prohibition against bias is illustrated in *Re Energy Probe and Atomic Energy Control Board* (1984), 15 D.L.R. (4th) 48 (F.C.A.D.). For an overview of the duty to give reasons, see H.L. Kushner, "The Right to Reasons in Administrative Law" (1986) 24 Alta. L. Rev. 305.

as they do so, according to Mullan, legitimacy will be on their side.[131]

In my view, the courts operate under severe institutional limitations. I do not, however, think these limitations will lead the practice of fairness review to some kind of crisis. One reason for this is that there are other institutions involved in the creation of procedural rights besides the courts. For example, the refusal of courts to supervise procedural fairness in rulemaking has not prevented rulemaking bodies from giving affected individuals and groups substantial opportunities to participate in their proceedings. Nor has it prevented the legislature from doing so expressly in statutes. Also, even if the courts imposed a procedural framework which threatened to impair the ability of the state to exercise important regulatory or coercive functions, it is quite likely that the state would find alternative means of performing those functions. This is true even where the entitlement to procedural fairness derives from the *Canadian Charter of Rights and Freedoms*. For example, to the extent that officials feel that the decision of the Supreme Court of Canada in *Singh*[132] contributed to the inability of the state to control the flow of refugee claimants into Canada, it is likely they will find other forms of restriction.[133] Further, it is reasonable to assume that the more essential the state function being interfered with, the more likely it is that procedural controls will be circumvented.

---

[131] In addition to Mullan, *supra*, note 1, see "Procedural Fairness: *Nicholson* and the Tasks Ahead" in *Proceedings of the Administrative Law Conference, 1979* (Vancouver: U.B.C. Law Review, 1981) 219; "Natural Justice and Fairness - Substantive As Well As Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill L.J. 250; and his review of administrative law decisions of the Supreme Court of Canada in volumes 1-7 of the Supreme Court Law Review.

[132] *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 (S.C.C.).

[133] These include limiting entry into Canada through the imposition of visa requirements and limiting access to individual adjudication in certain circumstances. See Bill C-55, *An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, 2d Sess., 33d Parl., 1986-87. Also see Bill C-84, *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, 2d sess., 33d. parl., 1986-87.

3. Judicial politics

A third way of criticizing the current practice of judicial review of procedural fairness identifies the "politics of the judiciary"[134] and charts its impact on the distribution of procedural rights between different classes and groups in society. The ambition of this project is not just to challenge the courts because they are necessarily political. Rather, it is to confront and to criticize the politics of the court. Regrettably, administrative law scholars in Canada have shied away from this kind of analysis. There may be many reasons for this, but it is not because Canadian judges are apolitical. There are certainly fairly clear indications that private property rights holders are procedurally well protected by the courts, as are police officers with respect to their jobs. However, in the absence of more systematic examination of the case law, we can only speculate as to the extent to which there is a fairly consistent set of political values which determine the distribution of fairness. As well, we need to know how participatory rights are distributed by legislatures and administrative agencies, and how they are re-distributed by the courts.

In sum, even if informalism in the law does not directly detract from the ability of the courts to play an important and positive role in the development of more procedurally fair administrative decision-making processes, there are still strong reasons for being skeptical about the likelihood that they will do so. This is because of their limited institutional capacity and because of the unsatisfactory political judgments they are likely to make. Furthermore, legal discourse about procedural fairness and rights to participate is extremely narrow and virtually excludes any consideration of more direct forms of participatory democracy as fundamental legal right.

B. *Procedural Justice in the Welfare State*

So far in this section we have focused on the capacity of the courts to design and implement fair procedures. However, even if

---

[134] See J.A.G. Griffith, *The Politics of the Judiciary*, 3d ed. (London: Fontana, 1985).

courts, or some alternative institution, perform this function, there still remains the question of the extent to which procedural solutions can resolve or ameliorate the crisis tendencies which undermined earlier bureaucratic models. Also, to what extent does the achievement of procedural fairness create possibilities for less powerful social groups to improve their position? To answer these questions, it is necessary that we return to our analysis of the political-economic context in which administrative fairness developed. In other words, we want to apply a social theory of law to better understand the possibilities and limits of the proceduralist solution.

In this regard, we might first consider a theoretical literature which expresses great optimism in the ability of new legal conceptions and institutions to overcome the limitations revealed in the model of legal formalism. What is common in this literature is the emphasis on the role of proceduralism and participation. One version is the model of responsive law developed by Nonet and Selznick.[135] In this model, law is primarily concerned with enablement and facilitation rather than restriction of state power. The role of law is to articulate principles of institutional design and institutional diagnosis to find ways for the realization of general purposes rather than the enforcement of specific rules. Because responsive law concerns itself more with purpose than with rules, legal obligation becomes more problematic. Majesty and precedent are unable to uphold the legitimacy and authority of the law. As a result, there is a blurring of the boundaries between law and politics, and participation takes on a new significance. It provides "a source of knowledge, a vehicle for communication and a foundation for consent":[136]

> The special problem of postbureaucratic organization is to enlist participation, to encourage initiative and responsibility, to create what Barnard called "cooperative systems" capable of tapping the autonomous "contributions" of multiple constituents. In purposive organization authority must be open and participatory: Consultation

---

[135] P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper and Row, 1978).

[136] *Ibid.* at 100.

> is encouraged; reasons for decisions are explained; criticism is welcome; consent is taken as a test of rationality.[137]

Building on the work of Nonet and Selznick, Teubner has advocated/predicted the emergence of a new legal form that he refers to as reflexive law.[138] Teubner's work is of particular interest not just because of its emphasis on proceduralism, but also because he specifically sees reflexive law as a solution to the crisis tendencies that Habermas identified in late capitalist social formations.[139] In this model, economic crisis tendencies were shifted into the political system, but not resolved there. Rather, the shift generated political crisis tendencies, including both rationality and legitimation crises. This occurred because the state could not cope with the complexity of socio-economic processes and because it was beset by contradictory imperatives which prevented it from performing economic steering functions. A legitimation crisis ensued because the state could not fulfill the promises it made and because of the erosion of traditional sources of legitimation. As a result, procedural legitimation is one of the few options open: "Since ultimate grounds can no longer be made plausible, the *formal conditions of justification themselves obtain legitimating force.*"[140]

The purpose of reflexive law is "to create the structural premises for a decentralized integration of society by supporting integrative mechanisms within autonomous social subsystems."[141] It does so through a procedural orientation which "only determines the organizational and procedural premises of future action."[142] In other words, reflexive law is law that "puts in place autonomous and self-legitimating constitutions for diverse domains, each having its

---

[137] *Ibid.* at 99 (fn. omitted).

[138] G. Teubner, "Substantive and Reflexive Elements in Modern Law" (1983) 17 Law & Soc. Rev. 239.

[139] *Ibid.* at 267-69. See generally, Habermas, *supra*, note 95.

[140] J. Habermas, cited in Teubner, *ibid.* at 269.

[141] Teubner, *ibid.* at 255.

[142] *Ibid.* (fn. omitted).

own distinctive principles and appropriate mechanisms, with the overall legal framework providing for mutual respect among the spheres."[143]

Rod Macdonald also proposed a model of administrative law that is premised on a similar optimism about the possibilities of renewed proceduralism. As we saw earlier, he rejected the courts and adjudication as the institution and process for conducting implied procedural review. Nevertheless, Macdonald strongly favoured procedural fairness review. It was, in his view, a means of addressing institutional behaviour and rationality, of integrating activity in one sphere into a larger institutional context, and of guaranteeing effective participation by individuals and groups affected by administrative action.[144] Because a complex society needs a variety of social ordering processes, it is essential that people with an understanding of the uses, limits, and purposes of these various processes perform this review. Although Macdonald did not develop a theory of administrative legitimacy, he ultimately grounded the entire structure on a theory of consent. In order for a social ordering process to be legitimate, it must be consented to by all parties. To resolve a disagreement over the appropriate procedural paradigm, Macdonald advocated the use of a mediational process rather than a political one. This was because of the consensual basis of mediation.[145] In the event that mediation failed, however, Macdonald was caught in a conundrum.

In many ways, Macdonald's model of law is closely akin to the model of reflexive law described by Teubner. They both saw the function of law as that of regulating and coordinating social ordering processes. Further, they both believed that in society there are a wide range of semi-autonomous spheres, each of which has its own distinct functions and characteristics. Also, these attempts to find proceduralist solutions to the crisis of law and legitimacy in the welfare state share a number of common assumptions. The most

---

[143]D. Kettler, "Legal Reconstitution of the Welfare State: A Latent Social Democratic Legacy" (1987) 21 Law & Soc. Rev. 9 at 36.

[144]R. Macdonald, "Judicial Review," *supra*, note 143 at 5-8.

[145]See "A Theory of Procedural Fairness," *supra*, note 146.

consensus, or at least the possibility of constructing one procedurally. Thus, for example, at the close of their discussion of responsive law, Nonet and Selznick write: "Responsive law presupposes a society that has the political capacity to face its problems, establish its priorities, and make the necessary commitments. For responsive law is no maker of miracle in the realm of justice. Its achievements depend on the will and resources of the political community."[146]

Also, at least for the more progressive, there is an assumption that society has reached a certain level of democratization and equalization of power. That is, there is a belief that people can participate on a roughly equal basis. Again, Nonet and Selznick express this aspiration most clearly:

> One effect of legal pluralism is to multiply opportunities *within* the legal process for participation in the making of law. In this way the legal arena becomes a special kind of political forum and legal participation takes on a political dimension. In other words, legal action comes to serve as a vehicle by which some groups and organizations may participate in the determination of public policy.[147]

A universal assessment of the potential of enhanced procedural fairness or participation, to improve the efficacy of administration while simultaneously legitimizing and democratizing the administrative process, is beyond the scope of this paper. However, it would be useful to examine the empirical basis for the level of optimism that these authors share.

The most important deficiency in the preceding analyses is the failure to appreciate the structural determinants of the crisis of the welfare state, and the impact of these determinants on the viability of procedural solutions. In particular, there is a distinct tendency to underplay the conflict which initially led to the expansion of the role of the state, and has since made the state itself, including its administrative branch, into a terrain of conflict. To the extent that the state faces contradictory demands, there is little reason to believe that more and better participation will lead to a resolution of that conflict. A more participatory process may

---

[146] *Supra*, note 154 at 113 (fn. omitted).

[147] *Ibid.* at 96 (fn. omitted).

achieve some measure of increased legitimacy, but often will not satisfactorily resolve substantive disagreements. Losers in these disputes may find small consolation in the fact that they have been heard, especially if they are consistent losers.

Not only does this analysis underemphasize the existence of conflict or contradiction, it also underemphasizes the unequal distribution of power between social classes and its impact in the administrative process. This inequality manifests itself in a variety of ways. First, participation is often expensive and in the absence of external funding, many will be unable to afford to participate effectively. This is the most direct and immediate effect of inequality. It is also the one about which reformers have done the most by providing legal aid and other forms of intervenor funding. However, even if creative funding mechanisms are found to offset the direct impact of economic inequality, there still remain more subtle, but equally important effects of inequality. Both Marxists and non-Marxists have recognized that the state is constrained by the investment decisions of capitalists. First, the state itself is dependent on its ability to raise revenue through taxation, and therefore depends on a healthy economy, which in turn is dependent on private investment. Second, the electorate judges governments, at least in part, on the performance of the economy. The level of private investment has a substantial impact on the economy and the economic well-being of the population. Thus the pressure to maintain a high level of "business confidence" is a continuous and pervasive influence on the formation of state policy.[148] In the words of Lindblom: "In the eyes of government officials, therefore, businessmen do not appear simply as the representatives of a special interest, as representatives of interest groups do. They appear as functionaries performing functions that government officials regard as indispensable."[149]

Ontario's designated substance regulation process provides a good example of the significant impact that conflict and inequality have on a participatory model of bureaucracy. The *Occupational*

---

[148]For a Marxist version of this theme, see Offe, *supra*, note 99 at 119-29. For a non-Marxist version see Lindblom, *infra*, note 168, c. 13.

[149]C.E. Lindblom, *Politics and Markets* (New York: Basic Books, 1977) at 175.

Health and Safety Act requires the Minister of Labour to give notice that a substance may be designated and to call for submissions in that regard.[150] In practice, the Ministry gives even greater rights of participation in the designated substance process than those prescribed by statute.[151] Yet despite the apparent openness of this process, the Ontario Federation of Labour decided to boycott it in 1984. This was a result of its negative experiences with that process in its first years of operation.[152]

First, it was clear there were substantive disagreements between labour and capital over priorities in standard setting and in the content of the standards. For example, labour favoured stricter exposure limits than those favoured by capital. Also, labour wanted the Ministry to regulate on the assumption that all substances and physical agents are harmful unless proven safe. Capital did not want the government to act unless there was scientific evidence to establish the presence of a hazard. The opportunity to participate in the formation of policy did not lead to a narrowing of differences between labour and capital. Instead, it constituted the administrative process as a new terrain of conflict.

Conflict by itself, however, did not cause labour to boycott the administrative process. Rather, labour did not feel that it was effectively participating. As I have argued elsewhere, the Ministry selected standards which deemed acceptable exposure levels that workers were currently experiencing in major organized industries. In effect, organized workers were doing no better in the regulatory process than they had done in the capitalist labour market.[153] In part, labour attributed this result to the effects of inequality

---

[150]R.S.O. 1980, c. 321, s. 22(a) (as amended).

[151]The process is described in C.J. Tuohy, "Procedural Rationality and Regulatory Decision-Making: A Decision Framework Approach" (1985) 7 Law & Policy 345 at 352-4.

[152]See Ontario Federation of Labour, "Towards a More Comprehensive Approach to Regulating Workplace Health Hazards" (brief to Ontario Ministry of Labour, Feb. 1984) [unpublished].

[153]See E. Tucker, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" in G. England, ed., *Essays in Labour Relations Law* (Don Mills, Ont.: CCH, 1986) 219 at 235-8.

manifested in the designated substance process. Employers had better access to information and greater financial and manpower resources to devote to each step in the process.

To remedy this inequality, organized labour recommended the establishment of a publicly funded, permanent labour-management standards committee. In effect, it sought a form of worker co-determination. While this would be a step in the right direction, it still does not come to grips with the structural basis of inequality and its likely impact on such a standard setting process. Labour in this country lacks the organizational and political power to offset the power of private capital. Formal equality and equality of resources within the administrative process will not significantly offset the substantive economic and political inequality between labour and capital in the social formation. This is the reality which must be confronted in any realistic assessment of the possibilities of participatory solutions to resolve the problems confronting the capitalist state.

Obviously, a single example does not demolish or prove a thesis. However, even the supporters of proceduralism recognize its limits. For instance, Teubner has conceded that consumer law provides a shaky example of the potential for reflexive law: "This strategy necessarily fails if social asymmetries of power and information can resist institutional attempts at equalization."[154]

The point of this argument is not to suggest that the capitalist state will never act against the interests of capital and that, therefore, the development of more open processes of administrative decision making has no significance. Rather, I want to draw attention to the salience of conflict and unequal power relations to any understanding of the growth and development of the state and the institutional arrangements for the exercise of state power. In social democratic countries where past struggles have resulted in the creation of a stronger working class movement, or where social movements exercise greater power, procedural approaches may indeed result in both more efficacious and more democratized decision making. They can exercise their greater social and political

---

[154]Teubner, *supra*, note 157 at 277. He has also conceded its limited applicability to collective bargaining. See Kettler, *supra*, note 162 at 39.

power to create procedural opportunities located higher up on "the ladder of citizen participation." Instead of being limited to manipulation, consultation, and placation, they are more likely to achieve partnership, delegated power, and control.[155] In social formations that are more liberal than social democratic, such as Canada and the United States, the mal-distribution of wealth and power renders problematic any strategy that focuses on proceduralism either as a form of legitimation or as a strategy for empowerment. The failure to recognize this leads to unduly optimistic predictions about the benefits of proceduralism by both liberals, who are seeking to reconstitute legality in the welfare state, and by radicals, who are seeking for struggle.[156]

V. CONCLUSION

Our preliminary inquiry into the development of procedural fairness, both as a requirement imposed by the courts and as a model of bureaucratic operations, should not lead us to despair that once again the state and the courts have devised a cunning strategy to divert challenges from progressive movements into dead ends where their energies will be dissipated and their efforts be defeated. It is unfair to overemphasize the limits of increased participation without recognizing its possibilities. Past struggles have succeeded in partially politicizing the processes of accumulation and legitimation in the capitalist social order. The capitalist state has developed its administrative capacities, but has been unable to contain conflicts that arise. One of the concessions it has made, sometimes legislatively, sometimes administratively, and sometimes at the insistence of the courts, is to allow greater public participation in its administrative processes. This has created greater potential for democratic control and the disruption of the state's role in

---

[155] S. Arnstein, "A Ladder of Citizen Participation" (July, 1969) Journal of American Institute of Planners 216 at 217.

[156] For the elaboration of similar concerns, see J.F. Handler, *supra*, note 144; Kettler, *supra*, note 162; S. Fredman & S. Lee, "Natural Justice for Employees: The Unacceptable Faith of Proceduralism" (1986) 15 I.L.J. 15; Mandel, *supra*, note 113; and T. Landau, "Due Process, Legalism and Inmates Rights: A Cautionary Note" (1984) 6 Can. Crim. Forum 151.

reproducing capitalist social relations. On the whole, however, participatory rights are not empowering. They do not create direct, popular controls over the administrative apparatus of the state and they do not offset the unequal distribution of social power. Nevertheless, they do provide a foothold and a new baseline from which to make further claims.

The pursuit of procedural fairness as a transformative strategy, however, does need careful consideration. There are risks as well as benefits. For example, the extension of procedural and participatory rights benefits corporations who are resisting state regulation. Indeed, they may benefit disproportionately from the extension of procedural rights as they have the resources to exercise these rights fully. As well, the channelling of disputes into legal or administrative forums may lead to a reduction of participatory democracy. Instead of mass participation in strikes, referendums, demonstrations, and other similar activities, representatives (who are frequently lawyers) call evidence, cross-examine witnesses, and make submissions, usually respectfully.

Finally, the developments we have examined support the view that law is articulated with the social formation and is not as contingent as many have supposed. In the field of administrative law, and in particular in those areas of regulation which involve inter-class conflict, it is particularly useful to explore the relationships between the crisis tendencies that have driven the expansion of the capitalist state, the institutional forms this has taken, and the development of the legal framework for the exercise of delegated power. Further, because the choice of transformative strategies requires careful consideration of power relations and the institutional apparatuses through which they are mediated, it is crucial that critical legal theorists also develop a critical social theory.